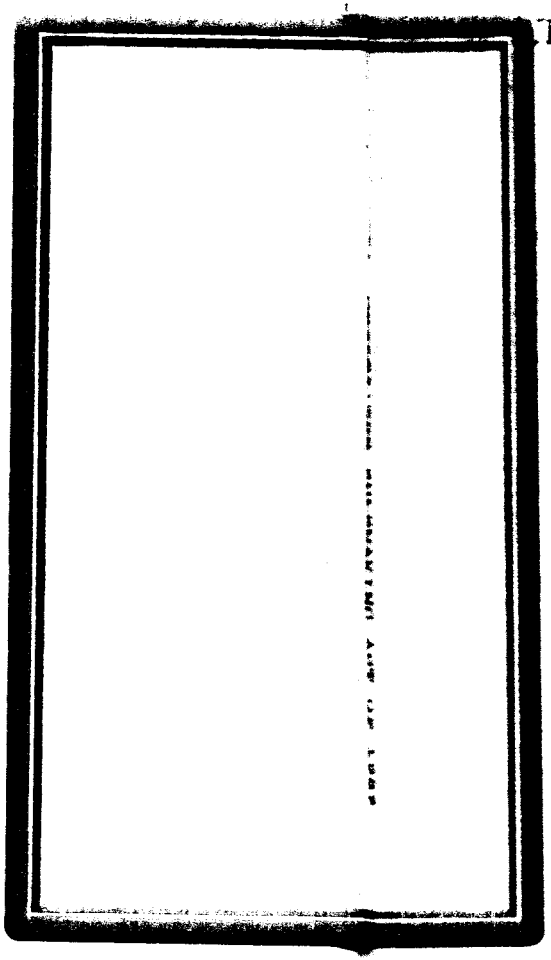

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 3052

NEGOTIATED RULEMAKING ACT OF 1987

AUGUST 10, 1988

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ADDITIONAL MATERIAL

NEGOTIATED RULEMAKING ACT OF 1987

WEDNESDAY, AUGUST 10, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2237, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Frank, Berman, and Coble.

Staff present: Janet S. Potts, counsel; Jen E. Ihlo, assistant counsel; Belle Cummins, assistant counsel; Roger T. Fleming, associate counsel; and Florence T. McGrady, legal assistant.

Mr. FRANK. The House Judiciary Subcommittee on Administrative Law and Governmental Relations will come to order. The hearing this morning will address H.R. 3052, "The Negotiated Rulemaking Act of 1987."

(A copy of H.R. 3052 follows.)

I

100TH CONGRESS
1ST SESSION

H. R. 3052

To provide for an alternative to the present adversarial rule making procedure by establishing a process to facilitate the formation of negotiated rule making committees.

IN THE HOUSE OF REPRESENTATIVES

JULY 29, 1987

Mr. PEASE introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide for an alternative to the present adversarial rule making procedure by establishing a process to facilitate the formation of negotiated rule making committees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Negotiated Rule Making Act of 1987".

SEC. 2. FINDINGS.

The Congress makes the following findings:

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(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act.

(2) Although the purpose of regulation has been to promote the safety and general welfare of the American public, the rule making process tends to discourage parties from meeting and communicating with each other, and this leads to the assumption by parties with different interests of conflicting and antagonistic positions toward agency rules, which may result in expensive and time consuming litigation.

(3) The adversarial nature of rule making deprives the affected parties and the public at large from the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule.

(4) The adversarial nature of rule making also deprives the affected parties and the public from the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

(5) A proposed rule developed and negotiated by the parties who are affected by the rule will increase the acceptability and enforceability of the rule by those parties, and affected interests will be less likely to resist enforcement or challenge the rule in court.

(6) Although many agencies already have the authority to establish negotiated rule making committees pursuant to the laws authorizing such agencies and their programs and pursuant to the Federal Advisory Committee Act, and, in fact, several agencies have already successfully engaged in negotiated rule making in connection with informal rule making proceedings, the process has not been widely employed by other agencies, perhaps because such agencies are unfamiliar with the process or uncertain as to their authority.

SEC. 3. PURPOSE.

The purpose of this Act is to authorize agencies to supplement and enhance the rule making procedures under the Administrative Procedure Act, where appropriate, by establishing a negotiated rule making committee of persons representing interests that will be affected by an agency rule to participate in and negotiate that rule's development.

SEC. 4. DEFINITIONS.

For purposes of this Act—

(1) the term "agency" has the same meaning as in section 551(1) of title 5, United States Code;

(2) the term "person" has the same meaning as in section 551(2) of such title;

(3) the term "party" has the same meaning as in section 551(3) of such title;

(4) the term "rule" has the same meaning as in section 551(4) of such title;

(5) the term "rule making" has the same meaning as in section 551(5) of such title;

(6) the term "convenor" means an individual selected by an agency to assist the agency in determining whether a negotiated rule making procedure is feasible and appropriate;

(7) the term "consensus" means—

(A) unanimous agreement among the interests represented in the development and negotiation of a proposed rule under this Act, except where subparagraph (B) applies, and

(B) a general but not unanimous agreement, in the case of a particular negotiated rule making committee that so defines "consensus";

(8) the term "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;

(9) the term "mediator" means a person who aids in the discussions and negotiations among the members of a negotiated rule making committee to develop and negotiate a proposed rule; and

(10) the term "negotiated rule making committee" means an advisory committee established by an agency in accordance with this Act and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

SEC. 5. DETERMINATION OF NEED FOR NEGOTIATED RULE MAKING COMMITTEE.

(a) FACTORS IN MAKING DETERMINATION.—An agency may establish a negotiated rule making committee to develop and negotiate a proposed agency rule whenever the head of the agency determines that the use of the negotiated rule making procedure is in the public interest. In making such a determination, the head of the agency shall consider whether—

(1) there is a need for a rule;

(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

(3) there is a reasonable likelihood that the rule can be developed by a negotiated rule making committee composed of persons who can adequately represent the interests identified pursuant to paragraph (2), and who are willing to negotiate in good faith to reach a consensus on the proposed rule;

(4) there is a reasonable likelihood that the negotiated rule making committee will reach a consensus on the proposed rule within a fixed period of time;

(5) the negotiated rule making procedure will not unreasonably delay the notice of proposed rule making and the issuance of the final rule;

(6) the negotiated rule making procedure will not unreasonably increase agency expenditures to develop the final rule; and

(7) the agency, to the maximum extent possible, will use the consensus of the negotiated rule making committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

(b) USE OF CONVENOR TO IDENTIFY INTERESTS AFFECTED.—An agency may use the services of a convenor to assist the agency in—

(1) identifying parties that may be significantly affected by a proposed rule, and

(2) conducting discussions with such parties to identify the issues of concern to such parties and to ascertain the feasibility and desirability of the establishment of a negotiated rule making committee by the agency.

The convenor shall report its findings and shall make recommendations to the agency for the consideration of the agency. The convenor shall recommend, upon request of the agency, the names of persons who are qualified to represent the interests significantly affected by the proposed rule.

SEC. 6. PUBLICATION OF NOTICE.

(a) If, after considering a convenor's report or after conducting its own assessment, an agency decides to establish a negotiated rule making committee to develop and negotiate a proposed rule, the agency shall publish in the Federal Register a notice which shall include—

(1) an announcement that the agency intends to establish a negotiated rule making committee to develop and negotiate a proposed rule;

(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(3) a list of interests which are likely to be significantly affected by the rule;

(4) a list of persons proposed to represent these interests;

(5) a proposed set of committee procedures for review and adoption by the negotiated rule making committee;

(6) a proposed agenda and schedule for completing the work of the negotiated rule making committee;

(7) a description of administrative and support services for the negotiated rule making committee to be provided by the agency; and

(8) a solicitation for comments on the proposal to establish the negotiated rule making committee and on the proposed membership of the negotiated rule making committee.

(b) APPLICATIONS AND NOMINATIONS FOR MEMBERSHIP ON A COMMITTEE.—Persons who may be affected by a proposed rule and who believe that their interest will not be adequately represented by any person specified in a notice pursuant to paragraph (4) of subsection (a) may apply for, or nominate another person for, membership on the negotiated rule making committee to represent that interest with respect to the proposed rule. Each application or nomination shall include—

(1) the name of the applicant or nominee and a description of the interest that will be represented;

(2) a written commitment that the applicant or nominee will actively participate in good faith in the development of the rule under consideration, and evidence that the applicant or nominee is authorized to represent the interest proposed to be represented; and

(3) an explanation of why the persons specified in the notice pursuant to subsection (a)(4) will not ade-

quately represent the interest with respect to which the application or nomination is submitted.

SEC. 7. ESTABLISHMENT OF NEGOTIATED RULEMAKING COMMITTEES.

(a) TIME FOR SUBMISSIONS.—The agency shall provide at least 30 calendar days for the submission of comments, applications, and nominations under section 6.

(b) AGENCY ACTION AFTER COMMENTS.—After considering comments, applications, and nominations submitted under section 6, if the agency determines that a negotiated rule making committee will represent the interests that will be significantly affected by a proposed rule and the persons representing such interests on such negotiated rule making committee are likely to reach a consensus on a proposed rule, the agency may establish a negotiated rule making committee as an advisory committee pursuant to section 9 of the Federal Advisory Committee Act. If the agency decides not to establish a negotiated rule making committee after considering such comments, applications, and nominations, the agency shall promptly publish notice of that decision and the reasons therefor in the Federal Register.

(c) MEMBERSHIP OF COMMITTEES.—The agency shall limit membership on a negotiated rule making committee to 25 members unless the agency head determines that a greater number of members is necessary to the functioning of the

negotiated rule making committee or to achieve balanced membership. Each negotiated rule making committee shall include at least one individual representing the agency.

SEC. 8. CONSIDERATION OF PROPOSALS AND CONDUCT OF NEGOTIATIONS.

(a) CONSIDERATION BY COMMITTEES.—Each negotiated rule making committee established pursuant to this Act shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and concerning any other matter which the negotiated rule making committee agrees is relevant to the proposed rule.

(b) PARTICIPATION BY REPRESENTATIVE OF THE AGENCY.—The official representing the agency on a negotiated rule making committee shall participate in the deliberations and activities of the negotiated rule making committee with the same rights and responsibilities as other members of the negotiated rule making committee. The agency official shall be authorized to fully represent the agency in the discussions and negotiations of the negotiated rule making committee.

(c) SELECTION OF MEDIATOR; CHAIR IN LIEU OF MEDIATOR.—Notwithstanding section 10(e) of the Federal Advisory Committee Act, an agency may nominate either a person from the Federal Government or a person from out-

side the Federal Government to mediate the negotiations of the committee, subject to the approval by consensus of the negotiated rule making committee. If the negotiated rule making committee does not, for good reason, approve the agency's nominee of a mediator, the agency shall withdraw the nomination and submit a substitute nomination. If a negotiated rule making committee does not approve any nominee of the agency for a mediator, the negotiated rule making committee shall, with the concurrence of the agency, select a person to chair the committee. The agency official designated to represent the agency in substantive issues shall not chair the negotiated rule making committee or serve as mediator.

(d) FUNCTIONS OF MEDIATOR.—A mediator approved or selected by a negotiated rule making committee shall—

(1) chair the meetings of the negotiated rule making committee in an impartial manner;

(2) assist the members of the negotiated rule making committee in conducting discussions and deliberations; and

(3) manage the keeping of minutes and records as required by subsections (b) and (c) of section 10 of the Federal Advisory Committee Act, except that any personal notes and materials of the mediator or of the members of a negotiated rule making committee shall not be available for public inspection and copying.

(e) IMPARTIALITY OF MEDIATOR.—A mediator of a negotiated rule making committee shall act impartially and shall not vote on any agreement or recommendation made by the negotiated rule making committee.

(f) PROCEDURES OF COMMITTEES.—A negotiated rule making committee established pursuant to this Act shall adopt procedures for the operation of the negotiated rule making committee, including procedures with respect to membership, alternate members, disclosure of negotiation offers and statements, subcommittee and caucus procedures, and minutes and recordkeeping. A negotiated rule making committee may change its membership, rules, or agenda if the interests represented on the negotiated rule making committee reach a consensus on such change. Section 553 of title 5, United States Code, shall not apply to rules and procedures adopted by a negotiated rule making committee.

(g) FINAL REPORT AND DOCUMENTS.—At the conclusion of negotiations, a negotiated rule making committee shall prepare and transmit to the agency that established the negotiated rule making committee a final report and documents with respect to the negotiations conducted by the negotiated rule making committee, as may be required by the agency. If the negotiated rule making committee reaches a consensus and develops a proposed rule, the report shall contain the proposed rule and a concise statement of the basis

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and purpose of that rule. If the negotiated rule making committee does not reach a consensus on a proposed rule, the report shall specify the areas in which the negotiated rule making committee reached a consensus on a proposed rule and the areas of disagreement among the negotiated rule making committee, and shall include such recommendations and background materials as the negotiated rule making committee considers appropriate.

(h) RECORDS.—In addition to the report specified by subsection (g), a negotiated rule making committee shall submit to the agency the records required by subsections (b) and (c) of section 10 of the Federal Advisory Committee Act.

SEC. 9. TERMINATION OF COMMITTEES.

(a) UPON PROMULGATION OF FINAL RULE OR OTHER SPECIFIED DATE.—Except as provided in subsection (b), a negotiated rule making committee shall be terminated upon promulgation of the final rule under consideration, unless the agency specifies an alternate termination date.

(b) EARLIER TERMINATION.—An agency may terminate a negotiated rule making committee at any time if the agency determines that the negotiated rule making committee is not making sufficient progress toward reaching a consensus on a proposed rule or if the agency determines there is no further need for the committee.

SEC. 10. USE OF CONVENORS AND MEDIATORS.

(a) IN GENERAL.—An agency may employ or enter into contracts for the services of an individual or organization to serve as a convenor or mediator for a negotiated rule making committee under this Act, or may use the services of a government employee to act as a convenor or a mediator for a negotiated rule making committee.

(b) DETERMINATION OF CONFLICT OF INTEREST.—An agency shall determine whether a person selected to serve as a convenor or mediator of a negotiated rule making committee under paragraph (1) has any financial or employment interest that would preclude such person from serving in an impartial and independent manner.

SEC. 11. USE OF OTHER SERVICES AND FACILITIES.

For purposes of this Act, an agency is authorized to utilize the services and facilities of other Federal agencies and public and private agencies and instrumentalities with the consent of such agencies and instrumentalities and with or without reimbursement to such agencies, and to accept voluntary and uncompensated services without regard to the provisions of section 1342 of title 31, United States Code.

SEC. 12. COMPLIANCE WITH FEDERAL ADVISORY COMMITTEE ACT.

(a) IN GENERAL.—Each agency establishing a negotiated rule making committee under this Act shall comply with the provisions of the Federal Advisory Committee Act with

respect to such negotiated rule making committee, except that meetings of individuals for the purpose of considering and advising an agency on the feasibility of establishing a negotiated rule making committee shall not be subject to the requirement to charter an advisory committee specified in section 9(c) of the Federal Advisory Committee Act.

(b) CLOSED MEETINGS.—Meetings of subgroups or caucuses of a negotiated rule making committee may be in closed session for the purpose of determining negotiating positions or for developing alternative proposals for consideration by the entire negotiated rule making committee in open session.

(c) EXPENSES OF MEMBERS OF COMMITTEES.—Members of a negotiated rule making committee shall be responsible for their own expenses of participation in such negotiated rule making committee, except that an agency may agree, pursuant to section 7(d) of the Federal Advisory Committee Act, to pay reasonable travel and per diem expenses, and reasonable compensation, to persons affected by the rule if such persons certify that they do not have adequate financial resources to participate in such negotiated rule making committee and if the agency determines that their membership on the negotiated rule making committee is necessary to assure adequate representation of their interests.

SEC. 13. ROLE OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.

(a) CONSULTATION BY AGENCIES.—An agency should consult with the Administrative Conference of the United States for information and administrative assistance in forming a negotiated rule making committee, and with the Administrative Conference of the United States and other public or private individuals or organizations for information and assistance relating to negotiation and mediation processes.

(b) ROSTER OF QUALIFIED CONVENORS AND MEDIATORS.—The Administrative Conference of the United States, in consultation with the Federal Mediation and Conciliation Service, shall maintain a roster of individuals who are qualified to act as convenors or mediators in negotiated rule making proceedings. The roster shall include individuals both from government agencies and private groups, and shall be made available upon request. Agencies also may utilize rosters maintained by other public or private individuals or organizations.

(c) CONTRACTS FOR SERVICES OF CONVENORS AND MEDIATORS.—The Administrative Conference of the United States is authorized to enter into contracts for the services of convenors and mediators which may be used by agencies, on an elective basis, in negotiated rule making proceedings. Payment for convenor or mediation services obtained pursuant to such a contract shall be made by the agency obtaining

the services, unless the Chairman of the Administrative Conference agrees to pay for such services pursuant to subsection (f).

(d) COMPILATION OF DATA AND REPORTS ON NEGOTIATED RULE MAKING PROCEEDINGS.—The Administrative Conference of the United States shall compile and maintain data on negotiated rule making proceedings to assist agencies and parties in conducting agency proceedings. Each agency engaged in negotiated rule making shall provide to the Administrative Conference a copy of each report submitted to the agency by a negotiated rule making committee pursuant to section 8 and such additional information as may be required by the Chairman of the Administrative Conference of the United States to enable the Chairman to comply with this subsection. The Administrative Conference of the United States shall review and analyze the reports received under this subsection in each calendar year and shall transmit an annual report to the Congress containing recommendations concerning the use of the negotiated rule making process.

(e) TRAINING IN NEGOTIATED RULE MAKING.—The Administrative Conference of the United States is authorized to provide training in negotiated rule making processes to interested Federal personnel either on a reimbursable or non-

reimbursable basis. Such training may be extended to private individuals on a reimbursable basis.

(f) PAYMENT OF EXPENSES FOR NEGOTIATED RULE MAKING.—The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency head, all or part of the expenses of convening and conducting a negotiated rule making proceeding. Such expenses may include, but are not limited to, the costs of convenors and mediators, the costs for certain members determined to be eligible for assistance in accordance with section 12(c), administrative costs, and training costs. The determinations with respect to payments under this section shall be at the discretion of such Chairman in furthering the use of negotiated rule making procedures by Federal agencies.

SEC. 14. JUDICIAL REVIEW.

Any agency action pertaining to a negotiated rule making procedure shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule which is otherwise provided by law.

SEC. 15. CONTRACT AUTHORITY.

Any authority conferred by this Act to enter into contracts may be exercised only to such extent or in such amounts as are provided in appropriations Acts.

SEC. 16. AUTHORIZATION OF APPROPRIATIONS.

To carry out this Act, there are authorized to be appropriated to the Administrative Conference of the United States not more than $1,000,000 for each of the fiscal years 1988, 1989, and 1990.

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This morning we have with us the sponsor of the bill in the House, so we will now begin this hearing with Mr. Pease.

TESTIMONY OF HON. DON J. PEASE, REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. PEASE. Mr. Chairman, I am pleased to testify before you this morning on a bill to authorize the use of negotiated rulemaking by Federal agencies. As you know, administrative regulations often become the object of protracted litigation. For example, roughly 80 percent of the 300 regulations issued each year by the Environmental Protection Agency end up in court.

These court battles tend to be time-consuming, costly affairs that are often unnecessary. In certain cases, the process of rulemaking can be accomplished more fairly and efficiently through direct negotiations between the various interested parties.

Negotiated rulemaking has been tried a number of times with reasonable success. I will leave it to the experts testifying later to detail the track record for negotiated rules.

For now, I would simply state that the Federal Government ought to be doing what it can to reduce unnecessary and costly litigation. All too often, the relationship between Government and industry, labor and other groups is adversarial. I have sponsored this bill in the past four Congresses because I believe it would be good public policy to provide agencies with the option to encourage consultation and negotiation as an alternative to the traditional rulemaking process.

The legislation would not force the agencies to do anything they do not want to do. And I certainly do not intend that negotiated rulemaking should be employed to establish fundamental policy issues or to permit agencies to stray from statutory intent. I am mainly interested in making negotiated rulemaking available to the agencies as an option, for use when appropriate.

The Senate Governmental Affairs Committee has reported the legislation with a few minor changes that seem reasonable. I would encourage the subcommittee to consider the bill this session of Congress as well. We have here a modest opportunity to foster more harmonious, rational and efficient relations between the Government and private parties; we ought to take advantage of it.

Thank you very much.

[The statement of Mr. Pease follows:]

STATEMENT OF HON. DON J. PEASE

HOUSE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE LAW

HR 3052 -- THE NEGOTIATED RULEMAKING ACT OF 1987

AUGUST 10, 1988

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Thank you very much.

Mr. FRANK. Thank you. Let me say that I think the idea is a useful one, but I think we are sort of squeezed in terms of the time frame that we have left here, so I don't know if we can do it this year, but I am persuaded by you and Senator Levin that it ought to be seriously considered and just maybe we will get it through.

What interests me, and I appreciate that you said it is not coercive on the agencies, and we are going to hear testimony later from the panel consisting of the Industrial Safety Equipment Association and the National Senior Citizens Law Center to get their viewpoint.

You have made good suggestions that are very useful now and it may be that these can be accommodated. Really, Ms. Sweeney's concerns generally are as to those agencies and those administrations which have the tendency to try to squeeze out her advocacy groups, really the poorer people, and that this legislation might make it harder for them to be represented.

In some cases these groups traditionally, to be represented in our society, need the adversarial process, which is easily overlooked. Is there some way to accommodate that in this type of process?

Mr. PEASE. Mr. Chairman, as far as I know, this legislation would not prevent litigation after the rules are adopted.

Let me back up a minute. In the first place, if an agency is considering establishing a negotiating committee, then there must be a notice in the Federal Register that any group which wishes to be part of the committee can make its wishes known. That does not guarantee that the party will be a member of the committee, but, under the rules, under the language of the bill, if there is a considerable interest on the part of a party, that party is supposed to be included.

So I think the chances are pretty good that agencies or organizations like the ones you mentioned, would be a part of the negotiations in the first place. If they are not, or if they are not satisfied when the rule is promulgated or proposed to be promulgated, there is nothing at that stage to prevent that group from doing exactly what it does now.

Mr. FRANK. I figured that would be so. I am going to have my staff send you, if it is OK, the testimony between them and I would appreciate it, if, after we get back, we can look at it and talk about it. It seems to me, from reading it over, it should be possible to do that.

Mr. Coble, any questions?

Mr. COBLE. It is good to see you, and you and the chairman may have touched on this, but do not many agencies practice negotiated rulemaking now? Is it not done as a general rule?

Mr. PEASE. Some do, yes, some do have the authority to do it and there is enabling legislation for those agencies. The Federal EPA is one of them. But what we seek to do here is to make it possible for all Federal agencies to consider this as an option, if they wish to consider it.

Mr. COBLE. That is all I have. Thank you.

Mr. FRANK. We will get back to you.

Next we will hear from Senator Levin, who is a man with many concerns about this. Senator, thank you for joining us.

TESTIMONY OF HON. CARL LEVIN, UNITED STATES SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee. I have with me the counsel to my subcommittee.

First, let me thank the subcommittee for holding these hearings and for showing your interest in this subject. You know what the bill in general provides. I won't go over it so we can save the time.

Mr. FRANK. Without objection, you can submit any statement you want to submit as part of the record.

[The statement of Senator Levin follows:]

STATEMENT OF SENATOR CARL LEVIN
BEFORE THE HOUSE SUBCOMMITTEE ON
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
ON H.R. 3052, THE NEGOTIATED RULEMAKING ACT
August 10, 1988

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on H.R. 3052, the Negotiated Rulemaking Act. This bill, which was introduced by my friend, Congressman Don Pease, is a companion to S. 1504, a bill which I introduced in the Senate and which recently received approval by the Senate Governmental Affairs Committee to be reported to the floor for consideration by the full Senate. I am delighted that this Subcommittee is also considering this matter at this time.

As you know, negotiated rulemaking is a procedural device designed to encourage competing interests voluntarily to work together to achieve a consensus position on a controversial agency rulemaking. It is a process which invites parties who will be significantly affected by an agency rule to sit down together and negotiate in good faith to develop a draft regulation with which all the affected parties can live. Parties who successfully reach agreement on a draft then present it to the agency, with the

expectation that the agency will use it as the basis for publishing a proposed rule in the Federal Register.

This process, called "reg neg" by veteran users, has been the subject of Congressional scrutiny since about 1980. In that year, I held hearings and introduced a bill to encourage agencies to try the process. Congress responded then with caution, reasoning that the process was too new and untried to warrant legislation. The suggestion was to let agencies try the process on their own, to experiment with it, and to develop a track record which Congress could then evaluate.

Eight years later we have that track record. A number of agencies, including the Environmental Protection Agency, the Labor Department, and the Transportation Department, have used negotiated rulemaking to develop regulations on such varied issues as wood burning stoves, pesticides, benzene exposure limits, and working hours for airline pilots. Numerous parties have participated in the process, from industry to labor to environmental groups to consumers. And they agree that negotiated rulemaking is a winner.

In a hearing held in May before the Senate Governmental Affairs Committee, testimony was provided about the Government's negotiated rulemaking experiences to date. The Committee heard from agencies, rulemaking participants,

mediators and scholars. The witnesses agreed without exception that negotiated rulemaking has proven itself to be not only viable, but a very effective process when properly employed. Praise for the process included statements that, when used in the proper circumstances, negotiated rulemaking resulted in agency rules that were more effective, less costly, fairer in impact, quicker in achieving final status, and less subject to challenge in court. That's quite a track record.

And word is getting around in Congress. Provisions are appearing on an ad hoc basis in various bills directing agencies to use negotiated rulemaking when developing regulations in certain areas. Two examples are H.R. 5, the Elementary and Secondary School Improvement Act, now Public Law 100-297, which directs the Education Secretary to use reg neg to develop regulations required by the Act; and H.R. 1414, the Price-Anderson Amendments Act, which passed both Houses last week and which directs the Nuclear Regulatory Commission to use reg neg to resolve certain indemnification issues involving radiopharmaceuticals.

Given this trend as well as the desirability of encouraging proper use of the process, I believe it is time to provide a standardized framework for negotiated rulemaking. The key here is the word "framework." Negotiated rulemaking works best when it retains a flexible character

that can be adapted to the exigencies of each rulemaking situation. To bind the process too tightly, with too many procedural rules, would be to destroy its best feature.

At the same time, agencies which have not tried reg neg want and need guidance on how to proceed. It is not obvious how an agency should conduct a negotiated rulemaking so that it is consistent with the Administrative Procedure Act and the Federal Advisory Committee Act. These are the types of procedural issues which can and should be resolved in a uniform manner for all negotiated rulemaking sessions. In addition, there is expert information and assistance available on reg neg issues which should be made easily accessible to all agencies thinking of participating in the process. Each of these goals can be achieved through the Negotiated Rulemaking Act.

H.R. 3052 establishes a framework for conducting a negotiated rulemaking. First, it requires an agency deciding whether to try negotiated rulemaking in a particular setting to consider a number of identified factors, such as whether there is a limited number of readily identifiable interests, whether a consensus is likely to be reached, and whether the agency is willing to consider using the consensus position as the basis for a proposed agency rule. Experience has shown that careful selection of when to use the process is vital to the success of a negotiated rulemaking, and the bill provides

some tested standards and procedures for making that decision.

The bill also resolves key procedural issues, including how to publicize an agency decision to use negotiated rulemaking in a particular area, how to handle requests for additional participants, how to form a rulemaking committee in compliance with the Federal Advisory Committee Act, how to determine reimbursement of committee expenses, and how to use negotiated rulemaking in a manner that is consistent with the Administrative Procedure Act's requirements for proposed agency rules. In addition, the bill assigns to the Administrative Conference of the United States the responsibility to act as a clearinghouse for information and assistance.

As originally introduced, H.R. 3052 and S. 1504 were identical measures. In response to suggestions made by witnesses at the April hearing, however, we refined provisions in S. 1504 to improve the mechanisms guaranteeing flexibility and to reduce red tape. It was this improved bill that was ordered reported to the Senate floor. I hope the Subcommittee will review this revised bill at the same time it is considering the provisions of H.R. 3052.

The potential benefits of the negotiated rulemaking process have always been clear. Instead of affected parties spending their time and resources litigating a rule drafted and imposed by an agency, the affected parties and the agency spend their time and energies constructively developing a proposed rule together. The potential result is not only a rule which will become effective in less time, but also a rule which will be better substantively, since it will reflect the involvement of knowledgeable persons who will be directly affected by it.

Eight years ago, there was little evidence that these potential benefits of negotiated rulemaking would actually accrue. Now, we have a track record of success. Congress needs to extend that record of success by encouraging more agencies to try negotiated rulemaking under procedures which will guide but not inhibit the process. This is legislation whose time has come, and I ask this Subcommittee to act on H.R. 3052 to help it become law before the 100th Congress comes to its close.

Senator LEVIN. We have found that this bill is necessary, because many agencies are not using regulatory negotiation because they are uncertain as to whether it is appropriate to use regulatory negotiation in the absence of an authorizing statute.

The Administrative Procedure Act, some agencies feel, is an impediment to their using regulatory negotiation. There is a Federal Advisory Committee Act, FACA, which some agencies feel is an impediment to using regulatory negotiation. They are looking for explicit authority to use this process.

Even though we have many agencies that use regulatory negotiation and have used it successfully, we also have many agencies that simply are leery about using it in the absence of clear guidance from the Congress as to how it will jive with the other administrative statutes.

The one point I would like to make before I open this up to questions is the following:

There is momentum towards regulatory negotiation and that is healthy. We are all for it, obviously. We want to promote this rulemaking process.

It is a voluntary mechanism; the bill is not forcing any agency to use it, but encouraging them to do it, making it feasible for them to do it. But part of this momentum is also what I consider to be unhappy news of about regulatory negotiation and that is what I want to spend a moment or two on.

Recently, there was a conference on a bill making amendments to the Price-Anderson Act. That conference utilized regulatory negotiation as the solution to a conflict between the House and Senate as to how something would be accomplished. That sounds good so far.

The problem is that the conference used it in a way the process was never intended to be used.

As you all know, regulatory negotiation has a "convenor" which works with the various groups having an interest to try to work out a solution to a problem in a way that will avoid litigation. The convenor of a regulatory negotiation is not somebody who makes a decision, it is not a judge, it is not an arbitrator. A convenor, or mediator, is someone who tries to get the parties to reach a consensus on their own. That is the role of the convenor in regulatory negotiation.

In the Price-Anderson Amendments Act, the conference adopted the mechanism of regulatory negotiation and said a convenor will get together the interested parties. The bill then says: The convenor shall, in not less than seven months after the date of enactment, submit to the Commission, that is, the Nuclear Regulatory Commission, recommendations for a proposed rule.

Now, what they are saying is that the convenor should make recommendations to the Nuclear Regulatory Commission for a rule, whether or not the parties have reached a consensus.

That is very different from regulatory negotiation. That is more like arbitration, an arbitrator who renders a decision. In order to avoid this use of regulatory negotiations—regulatory negotiation is supposed to be based on the voluntary coming together of people who have an interest in an area and are trying to achieve a consensus—we should have some kind of framework in law, so people

know what regulatory negotiation is and so that it is not used in a way that it was not intended to be used.

There are a lot of reasons for this bill. Most important is the confusion on the part of many agencies as to the role of the Administrative Procedure Act and the Federal Advisory Committee Act, and the need to have a framework here to show how regulatory negotiation with those two statutes and with other statutes.

There is also a need for this bill in order to avoid confusing uses of regulatory negotiation by those of us in the Congress who are interested in it.

The bill leaves a lot of flexibility in the use of regulatory negotiation. We do not try to pin down every single aspect of it, and it is left, obviously, to the voluntary use by agencies. This legislation facilitates its use, that is the intent of this bill. Let me leave it there, and I am now open to any questions you may have.

Mr. FRANK. Thank you.

Well, one of the problems is timing and we have to try to get our thinking done on this with enough time left for legislating it. In particular, we are coming to the end of this administration and there will be a new administration and no one knows what it will be like.

I think some people will be concerned about any excessive last minute regulating by an outgoing administration in any case.

So, from a timing standpoint, it is better to argue in part for waiting, which I said before you got here. My intention is to focus on the subject and we will go to work on it, but I think this role of ours in the regulatory process is making a lot of people nervous in looking at it, so I think there will be some discrepancy about it and it will be controversial as to whether or not it is easier to handle it with the new administration or have a last minute regulation.

Is that a concern of yours?

Senator LEVIN. I would have that concern if I felt the bill would in any way increase the likelihood of last minute regulating.

But I don't think this bill speeds up the process of achieving something. The objection to the last minute regulating is forcing regulations down people's throats, but regulatory negotiation's goal is to have regulations achieved through the consensus of everybody participating in the process and I am emphasizing everybody with an interest in the regulations.

Under this bill, the Administrative Conference has the capability of facilitating participation by individuals and groups who have an interest but cannot afford to carry forward that interest.

By the way, I think that is very different from the testimony we will be hearing later this morning, which expresses the fear—which I think is understandable—that we don't want to close out groups from important areas of regulation, one of which is the low income groups. This bill will make it less likely that agencies will close them out, because there is funding here by the Conference to provide to agencies to make sure that that input is there. Under the status quo, funding for those groups may not be there at all.

Mr. FRANK. But that is expensive and what about the concern dealing with the limitations of the Federal budget?

That is one of the concerns.

Senator LEVIN. The bill makes it clear that the Federal Advisory Committee Act is applicable.

Mr. FRANK. All right.

Mr. Coble?

Mr. COBLE. It is good to have you before us, Senator.

This is just to simplify this, and hopefully this will tend to reduce Federal litigation and will get more people involved prior to the filing of any litigation.

Suppose in the process a party becomes disinterested, I guess at that point there is nothing to keep him or her from litigating?

I guess the answer here is at least he would have a bite of the apple and would have had input.

Senator LEVIN. That is very correct. This is a voluntary process and it works well. It has been used for a long time; we have had good experiences with it now for over eight years. That freedom always exists. Regulatory negotiation is not binding on any participant and is also not binding on the agency.

This is another important point. The recommendation that comes out of this process is a recommendation to an agency. The agency does not give up the right to reject the rule. But there is a presumption, not binding, but a presumption that the agency will adopt the rule, and all of the parties act on that presumption when participating in the process. But the agency need not adopt it nor does any participant finally waive or give up a right to litigate if they change their mind at any point.

Mr. FRANK. Thank you.

One other thing I think at some point we will need to bring out, that is, the findings seem to me unduly harsh in criticism of existing rulemaking and adversarial and I assume they are not necessary to the bill. That may be part of the concerns that you people have.

Senator LEVIN. My staffer, Elise Bean here, reminds me that we have made some changes in those findings. We had a markup where a number of changes were made to the bill. That is one area where we have made changes.

Mr. FRANK. We will take a look.

Senator LEVIN. There are differences now between the House and Senate bills because of the committee amendments being adopted on that point.

If I could leave you with a thought in terms of the timing for this bill. I am not sure and you are not sure that we have time to pass a bill to go to conference and then come back. If we don't have that time, but there is a desire to proceed on the part of the House, I would think one possibility would be at least that you forward to us what you would like changed and then we can, assuming we agree with the changes, simply adopt the House changes on our bill when it goes through the Senate. In that way all of the changes that you recommended, assuming they are agreeable, would have been incorporated in the bill as it passed the Senate.

Senator LEVIN. I appreciate that. We probably will not be able to submit them, with all of the processing involved, to all of the members. The Republicans in the House are running sporadically and with irregularity here and sometimes they are for going through all of the steps, not always, but some of the time, and I am not sure

now they will respond to the bill in that situation. But we are going to look at it.

Senator LEVIN. Yes, if your committee has time, whatever your processes are, to reach a conclusion on this.

Mr. FRANK. The point I am making is we cannot get it through all of the committee members.

Senator LEVIN. Right.

Mr. FRANK. I believe you have here a copy of your bill, which will be helpful.

Senator LEVIN. Yes. Thank you.

Mr. FRANK. Thank you.

Next we will hear from the Administrative Conference of the United States, Mr. Breger, Chairman.

TESTIMONY OF MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY GARY J. EDLES, LEGAL COUNSEL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. BREGER. Thank you, Mr. Chairman. I am accompanied by Mr. Gary Edles, the Legal Counsel of the Conference.

Mr. Chairman, you have to place this bill in an administrative law context. It reflects the explosion in rulemaking that has come about in the "Great Society" and it reflects the explosion in litigation that has occurred in the last 20 years regarding the United States Government's rules.

I might point out that over 80 percent of the EPA rules are litigated in court so that the rulemaking process, which was designed to be the end of a deliberative process, ends up just being the beginning, the first round in court litigation.

It reflects the desire for an increased public participation in the rulemaking process because of the fact that presently the informal rulemaking, with its notice and comment procedures, does not always provide for the best kind of public input, the agency using whatever public discussion it wants ad hoc beforehand.

It just issues a draft of the rules in the Federal Register and asks for comments. It gets the comments, reads them, thinks about them, and issues the final rule. The opportunity for structured public interaction is not very great, unless the agency chooses to go out of its way to create that structure. So it is out of this context that interest in negotiated rulemaking developed.

Secondly, you have to remember that we are still at an experimental stage. I can't imagine that there are more than 20 regulatory negotiations that have begun, failed, or even been dreamt about. This gives us a chance to shape an option in the rulemaking process.

Mr. FRANK. Are there any completed ones?

Mr. BREGER. Yes, there are, and there are a good number of successful completed ones and there are some that failed.

I might add that even failure gives agencies better vision. They can refine the issues and they can think of things in contention and this gives the agency more information and data.

In the abstract, this is a way for the agency to get information from the interaction of the public which helps it produce a better

rule. This is not going to work for all kinds of rules, therefore, it is only an option, not a forced requirement. If it works, everyone is happy. You have a rule which is presumptively better because of the public input beforehand in which the relevant and affected parties have had their say and are satisfied.

What are the fears? The fears attract a lot of classics of democratic theory, that interest groups, the consumer, and environment groups, the industry, will get together and gang up on the public interest. The agency should prevent that. The agency is not supposed to sit there and ponder it and say: Now, if you guys get together and start an agreement, we will sign off.

They are supposed to be there representing at least what their notion is of the public interest. We have examples in the past of voluntary codes of conduct which have created problems because the impacted industry, say, got together and signed on and were rubber stamped by the agency, where it is fair to say, "The interests are happy, but where is the public interest?"

That is not supposed to happen here. If it happens, that is a failure of the structure, a failure of the program.

Another concern is that people will not be able to get into negotiated rulemaking. I have not studied Ms. Sweeney's testimony. I only had a chance to look at it briefly. I can understand their concerns. I thank they are, in the broad sense, misplaced.

First of all, the purpose of this bill is to provide some money to make sure that the poor, a group that would otherwise not get their nose in the tent, will have some expense money to do so.

Second, the purpose of putting the Administrative Conference into this is to kind of help to develop structures, to make sure that the structures are developed that would be generally inclusive. This is a practical problem. You have the problem when you have a warranty act in the FTC and you have democratic theory involved whenever you get anything larger than a town meeting.

You do want to have the relevant interests, you do want to have the impacted interests, but you don't want a hundred interests coming in saying the same things. So there is going to have to be, in the nature of things, some discrimination, some decision-making as to which are the impacted interests and which are the affected interests and which are the relevant interests. Otherwise, you will be moving out of the council room into the Yankee Stadium in terms of holding your negotiation.

But I think, maybe, there is a conscious effort to exclude some groups, and this should not occur. Remember, the purpose of this thing is to try to achieve success, and if you fail to achieve success or relative success there will always be an opportunity for litigation.

So it should behoove an agency not to say, "I don't want to include the Law Center," because, as they suggest, they are tough customers and they are zealous advocates and they are going to play the game hard. They are going to do the same thing in litigation, so it is much better to see if you can get a consensus beforehand so you will want them to include the people who are likely to be affected so they will not litigate.

I think my conclusion is this is not a serious danger if you have properly run negotiated rulemakings.

Why should you have the bill? I think, first, to overcome bureaucratic inertia and to engage frankly in, and consciously in, all situations throughout the bureaucracy.

It is hard for Congress to appreciate the fact that something better can be done, better than it will be done, but often it requires a congressional statement to the effect that it is OK to have the bureaucrats start to think of it as something worth doing.

Second, to get in at an early stage with a new option of rulemaking and to try to better structure it and to make sure that the concerns of all people like Ms. Sweeney are met and just don't come about by inadvertence.

So I think the reasons for the bill are to continue to promote what we think is a good development.

Mr. FRANK. If we could get some of those efforts that you have mentioned, both the successful ones and the failing ones, that would be helpful to us, which agencies are most active.

Mr. BREGER. The EPA is the most active one and OSHA has been active.

Mr. FRANK. The two most contentious adversarial interests are, one, the Chemical Manufacturers—that is one.

Mr. BREGER. Yes.

Mr. FRANK. I was aware of it, but, frankly, had not realized that that was an example.

Mr. EDLES. Mr. Chairman, the Federal Aviation Administration was the first to do it.

Mr. FRANK. In which area?

Mr. EDLES. In the pilot and flight attendant hours, which had been a problem for years and years and years. They were able to hammer out an agreement to which the unions, the carriers, and the Government could all subscribe.

Mr. FRANK. OSHA is interesting, the numbers there, and I guess we will hear from them, out in this situation that you are talking about, the national organized interest groups, the pilots—when we talk about individual recipients we have to work a little harder.

Are there any potential individual beneficiaries who would have been involved in negotiated rulemaking, in anything like the black lung or other physical disabilities?

Mr. BREGER. An educational amendment passed this year will require that they call a modified negotiated rulemaking process. There are a number of key issues in the statute, including financial assistance to meet special educational needs of children.

This is an example of the Congress in the use of these types of bills.

Mr. FRANK. That is a good point. You are beginning to get a statute by statute program and it might be better to do it that way.

Mr. BREGER. If I could add that in the State of Massachusetts, as an example, their mediation service—which is not on all fours with a negotiated rulemaking but that mediation process has a lot of similarity—has used negotiation at the State level as far as standards of health care and for the siting of homes for the mentally disabled.

Mr. EDLES. That reminds me that rules for the carriage of handicapped persons by air has been successfully negotiated, although

there was a belief that was a type of rule that would not likely be amenable to the negotiated rulemaking, but it worked successfully.

Mr. FRANK. All right, I am going to have to recess for five minutes or ten minutes, and I apologize. We will come back and hear the final panel, so we will be in recess about ten minutes.

[Recess.]

[The statement of Mr. Breger follows:]

TESTIMONY
OF
MARSHALL J. BREGER

Chairman
Administrative Conference of the United States

before the
Subcommittee on Administrative Law and Governmental Relations
Committee on the Judiciary
United States House of Representatives

on H.R. 3052
"Negotiated Rule Making Act of 1987"

August 10, 1988

Introduction

Mr. Chairman and Members of the Committee, my name is Marshall J. Breger and I am Chairman of the Administrative Conference of the United States. I am pleased to be here today to present the views of the Administrative Conference on H.R. 3052, the "Negotiated Rule Making Act of 1987." The views I express are those of the Conference and not the Administration. I am especially pleased to be asked to address the subject of negotiated rulemaking, and to discuss H.R. 3052 in particular, because this is a process that holds great promise for alleviating some of the inefficiency and unpleasantness about the way in which regulatory agencies have gone about the task of formulating rules.

The Administrative Conference of the United States is an independent agency of the federal government that for twenty years has been working with agencies to improve their administrative procedures. Our recommendations are based on a combination of scholarly research, practical experience, and a continuing dialogue between the Conference and the other agencies. This dialogue is aided by the fact that somewhat more than half of the members of the Conference are high-level officials who represent the various agencies whose programs can benefit from our research and recommendations. Recommendations of the Conference are formally adopted at semi-annual plenary sessions after research, committee discussions, extensive public efforts to obtain the views of interested persons as well as government agencies, and formal debate. Our comments are based primarily on recommendations of the Conference adopted in this way, amplified and illustrated by the experience of agencies and others in following the recommended procedures.

In the last few years, the Administrative Conference has devoted substantial attention to exploring improved techniques for resolution of regulatory and other disputes in which the government is either a party or the ultimate decisionmaker. The term "alternative means of dispute resolution" (or "ADR") has come to refer generally to procedures that make use of negotiation, mediation, arbitration, and various other consensual approaches to resolving disputes. These techniques have been used for years in a variety of private sector settings, resulting in reduced litigation, faster and less costly decisions that are more acceptable to the parties, and the fostering of an attitude of greater cooperation among the parties in future dealings. We believe that similar benefits can be obtained where government agencies adapt ADR to their own needs.

In this spirit, the Administrative Conference twice formally adopted recommendations that encourage agencies to use negotiated rulemaking in appropriate situations.[1] The Conference has also adopted a number of additional recommendations that urge agencies to make greater use of negotiation techniques in other settings besides rulemaking.[2] We believe that negotiated rulemaking — sometimes called "regulatory negotiation" or "reg-neg" — is part of the same thrust as ADR, and can be viewed as ADR for rulemaking. Recently, Senator Charles Grassley introduced S. 2274, the "Administrative Dispute Resolution Act of 1988," which seeks to spur government use of ADR in adjudication. A similar bill, H.R. 5101, has also been introduced by Representative Donald Pease, sponsor of H.R. 3052. Those bills should be seen as complements to H.R. 3052 and to S. 1504, a bill pending in the Senate

[1] Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.82-4 and 85-5.

[2] Resolving Disputes under Federal Grant Programs, 1 C.F.R. § 305.82-2; Negotiated Cleanup of Hazardous Waste Sites under CERCLA, 1 C.F.R. § 305.84-4; Administrative Settlement of Tort and Other Monetary Claims Against the Government, 1 C.F.R. § 305.84-7; Agencies' Use of Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-3; Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-8; Assuring the Fairness and Acceptability of Arbitration in Federal Programs, 1 C.F.R. § 305.87-5; Alternatives for Resolving Government Contract Disputes, 1 C.F.R. § 305.87-11.

which is similar in content to H.R. 3052. We note that on June 27, 1988, the Senate Committee on Governmental Affairs reported out S. 1504.

Negotiated Rulemaking

I would like to turn to the particular ADR procedure — reg-neg — with which the Conference has had the most experience, and which is the subject of H.R. 3052. I would like to discuss it in somewhat of a historical context. Over the years, rulemaking has become far and away the dominant form of agency decisionmaking in which the public participates. Indeed, the informal rulemaking procedures established by the Administrative Procedure Act have been characterized by Professor Kenneth Culp Davis as "one of the greatest inventions of modern government."[3] In this connection, the Supreme Court's now-famous 1978 decision in the *Vermont Yankee* case,[4] where the Court decided that reviewing courts may not require agencies to adopt procedures beyond those set out in the APA, has provided agencies with an enhanced opportunity --and responsibility -- to tailor their rulemaking procedures to their special decisional needs.

At the same time, there has been a greater public involvement in the governmental process. Individuals and groups representing environmental, consumer, esthetic and other similar interests have joined those with an economic stake in the agency's action as active participants in the rulemaking process. This heightened involvement has been supported by court decisions enforcing rights to participate by an increasing list of interested parties.

Because Congress has largely assigned the task of defining the details of regulatory policy to administrative agencies, and has given the public a role in creating that policy, the process of making decisions that implement environmental, health and occupational safety legislation has, at times, become a battleground for interest groups and other affected parties. As an example, eighty percent of the Environmental Protection Agency's proposed rules are challenged in court. In other words, after internal agency review and notice and comment procedures, the process is not over. Rather, agency decisionmaking is simply the opening round in the inevitable courtroom litigation.

The cost of the rulemaking process, in terms of dollars spent, conflict, and delay is now widely recognized as a major impediment to efficient and effective regulation. Industry groups, public interest organizations, and administrative agencies are all concerned about the cost of regulation. The Administrative Conference believes that negotiated rulemaking (sometimes referred to as "regulatory negotiation" or "reg-neg") offers a means of fostering more cooperative approaches among persons and organizations with an interest in how regulations are written and implemented.

In a sense, the search for alternative procedures is not at all new. Administrative adjudication, after all, is often seen as a substitute for litigation in court. In like fashion, administrative agencies were created and given rulemaking authority in part to obviate the need for ongoing Congressional legislation. The current search for alternative procedures is an effort to find ways to ameliorate the factors that tend to formalize agency processes and encourage contentious behavior among parties to disputes that now arise before agencies. At the Administrative Conference's June 1987 colloquium on improving government dispute resolution procedures, the Administrator of the Environmental Protection Agency noted: "[W]e have concluded . . . that regulatory negotiation does work. We term it successful in our agency, particularly when we look at timeliness, the ability to get as much technical

[3] Davis, 1 Administrative Law Treatise 448 (1978).

[4] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

information as possible on the table during the development of the regulation, and the issue of litigation of the regulation once it has been completed."

The concept of negotiated rulemaking is quite simple. In ordinary rulemaking, the agency studies a problem through its own staff resources and reaches a tentative solution. It publishes that tentative solution as a proposed rule, and the public has an opportunity to offer comments. The agency then issues a final rule in light of those comments. In negotiated rulemaking, representatives of all affected parties, including the agency, come together in an effort to draft a proposed rule that takes into account the needs of the various interests, as well as the requirements of the underlying statute. The drafting often takes on the quality of labor-management negotiations, with all the give-and-take that such negotiations entail. In the end, if the negotiators can reach consensus, a proposed rule is fashioned, which receives the support, or at least the acquiescence, of all interested parties. If less than total consensus is achieved, the process can still be valuable in identifying and narrowing issues, and in enabling the agency to understand the concerns and viewpoints of all parties.

Among the ancestors of negotiated rulemaking are the experiences of private sector organizations that write voluntary consensus standards such as the National Electric Code, which are widely adopted as regulations by local and state governments throughout the country and by agencies of the federal government. Voluntary consensus standards are typically drafted through a negotiation process that is followed by some kind of publication with an opportunity for comment. Other experience that suggests the value of negotiation procedures includes growing use of mediation to resolve environmental disputes and numerous negotiated settlements of lawsuits challenging rules. Reg-neg is an attempt to draw on these experiences to improve rulemaking in federal regulatory programs.

Negotiated rulemaking brings into the regulatory process representatives of the people who have real interests at stake. Importantly, it does so at an early stage. It gives them the opportunity to discuss their mutual problems and their differing views in a setting that fosters cooperation. Moreover, each participant knows that failure to reach a consensus on a draft rule will inevitably result in the agency drafting the rule by itself. Thus the immediate attraction to participants is to "get in on the ground floor" before the rule takes shape, to be listened to, and to take responsibility for finding creative solutions that will recognize the legitimate needs of other affected parts of society and the public at large.

It must be stressed that such compromise solutions are in no way an abdication of agency responsibility. The agency has a continuing obligation to participate fully in the negotiations to assure that statutory requirements are met and that any agreement is basically fair. The agency cannot simply sit back and automatically accept as its policy whatever resolution of issues the competing interest groups in a reg-neg hammer out. In fact, it is the participation of representatives from the spectrum of different interests that serves as a primary guarantee of fairness. Additional protection is guaranteed by the fact that reg-neg is primarily a substitute for the drafting stage of the rulemaking process. Therefore, a proposed rule published by an agency and based on a consensus of representatives of the affected interests is still subject to the notice and comment provisions of the Administrative Procedure Act. In practice, where consensus is reached by the negotiating committee, the time, effort, and expenses involved in filing and responding to such comments is likely to be relatively small.

I would like to address the question of how negotiated rulemaking can serve the interests of individuals or smaller entities that might not participate directly in the negotiations. The convening process should identify all potentially affected interests, small or large. The convenor would then recommend to the agency suitable representatives of those interests. Section 6 of H.R. 3052 provides for publication of a notice in the Federal Register that would include a list of the identified interests and the persons proposed to represent them.

Moreover, sections 6 and 7 provide an opportunity for persons who believe that their interests will not be adequately represented to submit an application or a nomination for membership on the negotiating committee. This procedure is intended to ensure that no significant interest is overlooked or excluded from being represented in the negotiations. Indeed, sections 11(c) and 12(f) authorize the use of federal funds to pay expenses of participation for persons necessary for adequate representation of an interest, but who lack sufficient financial resources to participate.

In some cases, smaller entities can aggregate their interests and participate through a common spokesman, thereby gaining a voice they might not have in an ordinary rulemaking proceeding. It is not essential, though, that every affected individual or group be seated at the table, but rather that each significant interest be represented adequately. Negotiators thus may not always represent completely homogeneous constituencies. Recognizing that interest groups initially presumed to have similar interests may in fact differ on some concerns, the Administrative Conference has recommended that:

> The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become so divided as to suggest modification of the membership of the negotiating group.[5]

Nothing in H.R. 3052 would preclude this approach to dealing with individuals within a broad constituency. In any event, interested persons always retain the right to present their views directly to the agency in response to a notice of proposed rulemaking, in accordance with the Administrative Procedure Act (5 U.S.C. §553).

In 1982, the Administrative Conference completed the first study of the potential for using negotiation techniques in federal agency rulemaking. Based in part on a report by Washington attorney Philip J. Harter, the Conference adopted Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*. This recommendation set forth guidelines and criteria for the selection of regulatory problems that seemed conducive to trying to get representatives of affected interests to attempt to negotiate a solution. The Conference also set forth procedures that we believed would enable agencies to incorporate the negotiation of proposed rules into agency rulemaking proceedings. These guidelines and procedures have formed the basis of the successful use of reg neg by EPA, FAA, and a growing number of other agencies.

The Conference, in 1982, viewed negotiated rulemaking as an experiment that would have to be reexamined after a reasonable number of attempts to use it. In 1985, we reassessed our earlier recommendation on reg-neg in the light of agency experience, and adopted Recommendation 85-5, which refined and supplemented the original recommendation. Lessons learned from that study concerned the role of the regulatory agency in negotiations, the value of having one or more skilled mediators participate, and the usefulness of small-scale training opportunities. We also saw that in some instances it would be desirable to have a "resource pool" to support travel, training, or other appropriate expenses incurred by participants or expended on behalf of the negotiating group.

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[5] Recommendation 85-5, 1 CFR §305.85-5, ¶7.

The Administrative Conference has continued its efforts to acquaint other agencies with the potential value of negotiated rulemaking. We have regularly assisted agencies through informal discussions of procedural issues, creation of a working group to discuss reg-neg procedural issues, drafting notices, and suggesting sources of mediators. In 1987, we conducted a government-wide symposium on alternative means of dispute resolution including extensive discussion of negotiated rulemaking, the proceedings of which have been published in American University's *Administrative Law Journal*.[6] The Administrative Conference staff is currently preparing for publication a *Sourcebook on Negotiated Rulemaking* that will be a compendium of background information plus practical advice to agencies considering or conducting negotiated rulemaking proceedings.

Agency Experience with Negotiated Rulemaking

The first agency to start, and to complete, a negotiated rulemaking proceeding was the Federal Aviation Administration. The FAA's negotiated rule was a revision of flight and rest time requirements for domestic airline pilots. The agency's prior rules had been in effect for approximately 30 years. This was a period of substantial change in the airline industry, and the FAA had found it necessary to issue more than 1000 pages of interpretations. Moreover, on several previous occasions, the agency had made proposals for revising the rules, but withdrew them because of substantial opposition.

With the encouragement and assistance of the Administrative Conference, the FAA assembled a negotiating committee consisting of representatives of airlines, pilot organizations, public interest groups, and other interested parties. After an initial notice in the *Federal Register* announcing the forthcoming proceeding and naming the proposed participants, requests to participate were received from other interested parties, and some of them were added to the negotiating group. Negotiations took place in 1983, and the FAA published a notice of proposed rulemaking based on the negotiations in early 1984. The negotiating group was consulted again by the agency, and a final rule was adopted in 1985. The rule was not challenged in court. In 1987, the Department of Transportation again decided to use reg-neg, and convened a committee to negotiate a proposed rule concerning non-discrimination on the basis of handicap in air travel, implementing the Air Carrier Access Act of 1986. Negotiations have been completed and the Department is now drafting a rule based on the negotiations.

While the FAA was proceeding with its reg-neg, the Environmental Protection Agency also explored opportunities to use the procedures recommended by the Administrative Conference. Following the suggested criteria, EPA selected two regulatory problems for reg-neg. Rules were successfully negotiated dealing with penalties for manufacturers of vehicles not meeting Clean Air Act standards and emergency exemptions from pesticide regulations. Other rules adopted by EPA based on negotiations address performance standards for woodburning stoves and inspection and abatement of asbestos-containing materials in school buildings. The school asbestos rule was the first rule based on negotiated rulemaking to be challenged in court. The Court of Appeals for the District of Columbia Circuit, on May 10, 1988, upheld EPA's rule.[7] The appeal and the court's decision were based on the content of the rule; there was no challenge to the negotiation procedure. EPA's commitment to using reg-neg is underscored by its establishment of an office with ongoing responsibility for making reg-neg a success.

[6] A Colloquium on Improving Dispute Resolution: Options for the Federal Government, 1 Admin. L. J. 399 (1987).

[7] Safe Buildings Alliance v. EPA, 846 F.2d 79 (D.C. Cir. 1988).

The Occupational Safety and Health Administration has attempted to use negotiations in connection with two of its rules: standards for worker exposure to benzene and exposure to a carcinogen known as MDA (methylenedianiline) that is used in the manufacture of plastics. The benzene negotiations did not result directly in a draft rule, but did serve to narrow the issues in a useful manner. The MDA committee did reach a consensus on a proposed rule.

Two other agencies currently using reg-neg are the Minerals Management Service of the Department of the Interior and the Nuclear Regulatory Commission. The Interior Department reports that discussions are continuing on proposed air quality regulations for oil exploration, production, and development for the outer continental shelf off the coast of California. The NRC's reg-neg committee was formed to negotiate a proposed rule on submission and management of documents relating to the licensing of a geologic repository for disposal of high-level radioactive waste. Committee meetings began in September 1987 and are continuing. During the course of the negotiations, the composition of the negotiating committee was revised to reflect the narrowed focus on a single site in Nevada for a geologic repository, as provided in the recently enacted Nuclear Waste Policy Amendments Act of 1987.

Specific Provisions of H.R. 3052

In essence, H.R. 3052 sets up a framework for agencies to establish rulemaking negotiating committees in accord with recommendations of the Administrative Conference and following the model successfully used by EPA, FAA, and OSHA. The bill formally establishes the Conference as a clearinghouse of information and experience with reg-neg, and utilizes the Conference's expertise to keep the Congress continually informed as to how the process is working.

The bill, however, provides sufficient flexibility so that agencies have latitude to handle special situations. The bill contemplates further procedural improvements as agencies acquire more experience with negotiating rules. Indeed, section 13 provides for periodic reports to Congress by the Administrative Conference with further recommendations for the use of reg-neg.

Congress is coming to recognize the value of negotiating regulations, and has in two recent instances placed requirements in legislation that mandate use of reg-neg. In the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (Public Law 100-297), the Department of Education is required to conduct a "modified negotiated rulemaking" on at least four key issues. In H.R. 1414, the extension of the Price-Anderson Act, section 19 provides for negotiated rulemaking on indemnification of radiopharmaceutical licensees. While we appreciate that Congress has recognized the utility of the technique, we are concerned that in the absence of a statutory framework such as that embodied in H.R. 3052, each time Congress wants an agency to use reg-neg, a different procedure will be mandated. We believe it is better to set forth the basic principles in legislation such as H.R. 3052 than to have a proliferation of uncoordinated and inconsistent attempts to utilize reg-neg.

The bill also addresses two concerns that have previously discouraged agencies from giving serious consideration to reg-neg. First, the bill clarifies the applicability of the Federal Advisory Committee Act to reg-negs. Second, the bill authorizes funds to assist agencies in implementing the negotiated rulemaking process, to provide training, and to pay certain expenses of negotiating committees.

On the first point, while the Federal Advisory Committee Act has not yet caused serious problems for agencies using reg-neg, the state of the law is somewhat unclear regarding the ability of subgroups of a negotiating committee to meet privately. Such meetings or "caucuses" may be very useful to develop alternatives for consideration by the committee or,

in the case of allied interests, to determine a negotiating position. Rightly or wrongly, the fact is that many agencies are afraid to enter into reg-negs because of FACA fears. The language of section 11(b) is particularly helpful in clarifying this matter so as to remove this potential cloud on the use of reg-neg.

H.R. 3052 is designed to encourage agencies to consider using negotiated rulemaking, and not to give individual parties additional rights. In particular, we do not wish to see additional sources of potential litigation created. To this end, section 14 provides that agency actions pertaining to procedural decisions in reg-neg are not subject to judicial review. We believe that this is a critical provision of the bill and should be included in any legislation on negotiated rulemaking that is enacted.

We note that, to carry out the purposes of H.R.3052, the bill authorizes appropriations to the Administrative Conference up to $1 million for each of the fiscal years 1988, 1989, and 1990. The money will be used largely to encourage agencies to experiment with reg-neg where start-up costs would otherwise make agencies reluctant to depart from traditional processes. We believe that agencies will enjoy substantial long-term savings from reductions in expected litigation costs and, perhaps, reduced costs of agency compliance efforts. With regard to the Conference, we anticipate that we would rely on our current appropriations in 1988 and 1989. Because we are close to the beginning of fiscal year 1989, it may be more appropriate to change the authorization to 1990, 1991, and 1992.

On a related point, it would be helpful to include in the bill a provision that would expressly permit the Conference to handle private funds that could become available to pay expenses that may not be properly borne by the government, such as some expenses of participation by essential, but impecunious parties. This is a role that has sometimes been played by the National Institute for Dispute Resolution because there is no government entity at present to perform this role. I note that our existing statute authorizes the Conference to accept and utilize outside gifts and contributions, 5 U.S.C. §575(c)(12), so adding a reference to that provision should suffice.

The bill's other provisions that call for both consultative and reporting roles for the Administrative Conference, we believe, are of value. In addition to aiding particular reg-neg efforts, the Conference can continue to play a vital role in further development of both the theory and practice of reg-neg. Encouraging agencies to consult with the Conference as they undertake to convene reg-negs will help assure that the procedure is being continually improved.

We wish also to note a key provision of S. 1504, the Negotiated Rulemaking Act of 1988, as reported out by the Senate Committee on Governmental Affairs, that does not appear in H.R. 3052. S. 1504 contains a sunset provision that would terminate the act after six years, while allowing negotiated rulemaking proceedings already underway to continue under the terms of the act. We believe such a provision is useful so that a systematic review of the efficacy of the negotiated rulemaking program can take place at that time.

In closing, I would observe that the Conference could support either H.R. 3052 or S. 1504, as reported out by the Senate Committee. Thus, from our perspective, if either bill is conformed to the other, with whatever amendments or modifications are deemed necessary, it could help ensure passage of regulatory negotiation legislation before the end of this session of the Congress.

Mr. FRANK. The hearing will reconvene.

I apologize for the inconvenience.

Next we will hear from the panel. First the Industrial Safety Equipment Association, Mr. Frank Wilcher, President, and then Ms. Eileen Sweeney from the National Senior Citizens Law Center.

Mr. Wilcher.

TESTIMONY OF FRANK E. WILCHER, JR., PRESIDENT, INDUSTRIAL SAFETY EQUIPMENT ASSOCIATION, ACCOMPANIED BY FREDERICK J. HANNETT, THE JEFFERSON GROUP, WASHINGTON, DC.; AND EILEEN SWEENEY, ESQ., NATIONAL SENIOR CITIZENS LAW CENTER

Mr. WILCHER. Thank you, Mr. Chairman.

In our written statement that we submitted to the subcommittee, we think we have an exemplary case where the regulatory process has broken down and we think this is an opportunity where negotiated rulemaking would solve the problem.

This particular case involves the certification of respirators. A regulation that is handled by the National Institute for Occupational Safety and Health.

This is a case where the users of respirators, the manufacturers of these devices and virtually everyone who has participated in the rulemaking process to date has been opposed to what has been proposed by the agency. There has been no dialogue between those who have participated in public hearings and those who submitted comments and the agency.

It is clear that no one in this process, including NIOSH, the manufacturers, end users, OSHA, nor others, has all of the answers. However, review of the comments which have been submitted demonstrates that in spite of some differences, each of the parties has valid information and constructive ideas to bring to the debate.

But the problem lies in the absence of debate.

Put another way, there is no constructive dialogue or give and take in this situation.

Understanding the need for revising the old respirator standard and recognizing what appears to have become a stalemate, the Industrial Safety Equipment Association has explored the means by which the logjam can be broken and a constructive process created to assure the best possible means for providing optimum safety for respirator users. What we need is a vehicle which will get us all at the table.

After discussing the current dilemma with others, including other affected parties, academics, Federal regulators and those experienced in Government regulatory processes, it appears there is a way to take advantage of the input to formulate an acceptable consensus standard. This process, as you know, is negotiated rulemaking, the focus of this hearing.

Based on this experience, our Association supports the concept and practical application of negotiated rulemaking. It is the opposite of the adversarial rulemaking environment in which we were operating, and provides for constructive negotiation among interested parties.

We recognize that negotiated rulemaking has many advantages over the traditional process. It can serve as an excellent vehicle for information sharing, not just between the Government and the public, but also among public parties who may have opposing viewpoints and among Government agencies who may not agree. The process can clear the air of extraneous or highly charged issues and rhetoric by making all players openly accountable for their actions and comments. All players gain a vested interest or concept of joint ownership in the final product and this usually results in higher compliance and less litigation—both highly desirable goals for any Government agency.

Finally, even if a true consensus cannot be reached, the process always increases the level and scope of communication among the players.

Recognizing negotiating rulemaking as a potential means for removing our current stalemate over setting new standards for respirator certification, we have approached NIOSH and the Department of Health and Human Services to see if they are willing to try this process and to see if our parties can agree. While they have not yet accepted or rejected our request, it is clear that they have some reservations about the process based on their lack of experience in negotiated rulemaking.

Given the intent of this legislation, Mr. Chairman, we believe you hit the nail on the head by providing a base of information and the availability of individuals experienced in the process.

The Administrative Conference of the United States could assist agencies like HHS and NIOSH when embarking on a new process like negotiated rulemaking.

This process may be the only solution to what appears to be an intractable rulemaking stalemate, and could, in our view, get the process back on track.

Thank you, Mr. Chairman.

[The statement of Mr. Wilcher follows:]

ISEA Industrial Safety Equipment Association

Testimony on HR-3052
by
Frank E. Wilcher, Jr.
President, Industrial Safety Equipment Association
before the
Subcommittee on Administrative Law and Government Relations
of the
House Judiciary Committee

August 10, 1988

Mr. Chairman, as President of The Industrial Safety Equipment Association (ISEA) I appreciate the opportunity to testify in support of HR-3052.

For your background, the Industrial Safety Equipment Association is a non-profit organization composed of approximately eighty manufacturers of personal protective equipment for industrial environments. This includes hard hats, safety eyewear, and, of course, respirators which we will be discussing today.

Since its inception in 1934, the ISEA has been dedicated to the safety of workers who rely on protective equipment and to the welfare of the safety equipment industry.

As a results oriented association, ISEA is primarily dedicated to fostering public interest in safety and encouraging the use of proper equipment to deal with industrial hazards. Toward this end we work very closely with our member manufacturers and others to help them develop consensus standards so as to provide uniform product performance and use.

During my fourteen year tenure with ISEA, one of my major activities has been working with regulators, ISEA members and the end users of their products to ensure that we were working to

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a "minor" rather than a "major" rule; it called for field testing for which technology does not yet exist to the best of our knowledge; nor did it provide a protocol for the required field testing from the agency's perspective; and it required all respirators, regardless of their end use, be tested under mining conditions when 90-95 % of U.S. respirator usage occurs in non-mining environments.

In spite of 42-CFR-84's glaring shortcomings, in an effort to avoid an unnecessary adversarial atmosphere, ISEA and other parties asked to sit down with NIOSH early on: phone calls were made, letters were written, and informal and formal constructive comments were submitted. Again NIOSH would not talk with us directly and told us the only way to participate would be through submitting written comments to the docket and through testifying at formal public hearings at which there would be no give and take.

ISEA, our member companies and many others followed the NIOSH guidelines by submitting comments and testifying at the hearings. In fact more than 200 manufacturers, end users, labor unions, other government regulators, research institutions, public interest groups and Members of Congress submitted written comments to NIOSH. It is perhaps noteworthy that almost every institution which submitted comments or delivered testimony to NIOSH had major concerns with the proposal. The vast majority asked for its recall. The list includes the Occupational Safety and Health Administration (OSHA), Tennessee Valley Authority (TVA), E.I DuPont De Nemours and Company, Virginia Power, Aluminum Company of America, the AFL-CIO, and others. In spite of such unanimity of concern, as of this date the agency continues without more than formal acknowledgement that serious concerns exist.

Mr. Chairman, to date NIOSH's only substantive response was through a written statement, distributed at the January public meetings, which attempted to address in a uniquely unorthodox and unilateral manner some of the docket comments. It shouldn't go unnoticed also, that the news media were provided NIOSH's

statement before any of the parties who had been waiting many months. To the best of our knowledge, some parties have yet to formally receive any information or response from NIOSH as to our concerns, recommendations and requests.

In response to the many hours and significant expense ISEA and other affected parties invested in making suggestions, the only progress to date has been the reclassification by the Office of Management and Budget of 42-CFR-84 as a "major rulemaking", rather than its initial classification as a "minor rulemaking", thereby requiring a Regulatory Impact Analysis (RIA) which NIOSH hadn't planned on conducting. This decision was made in December, though NIOSH did not notify us of it until more than a month later. How the RIA is being developed and based on what data, we still do not know. (For the record we have offered to provide data but have been asked for none.)

This Mr. Chairman, is an exemplary case of where the regulatory process has broken down and must be put back on track to ensure maximum worker safety prevails and in a timely manner.

It is clear no one party to this process - including NIOSH, manufacturers, end users, OSHA, nor others - has all of the answers. However, review of the comments demonstrates that in spite of some differences, each of the parties has valid information and constructive ideas to bring to the debate.

The problem lies in the absence of debate. Put another way, there is no constructive dialogue or give and take.

Understanding the need for revising the old standard (30 CFR 11), and recognizing what appears to have become a stalemate, ISEA has explored potential means through which the log jam can be broken and a constructive process created to ensure the best possible means for providing optimum safety for respirator users. What we need, Mr. Chairman, is a vehicle which will get us all to the table.

After discussing the current dilemma with others - including other affected parties, academics, federal regulators, and those experienced in government regulatory processes - it appears there is a way to take advantage of this input to formulate an acceptable consensus standard. This process, as you know, is Negotiated Rulemaking -- the focus of this hearing.

Based on this experience, ISEA supports the concept and practical application of negotiated rulemaking. It is the opposite of the adversarial rulemaking environment in which we have been operating. It provides for the direct discussion of opposing points of view among interested parties. We believe it forces parties to deal with the values, needs and perceptions of each other and to prioritize their own demands, thus creating an incentive to compromise.

As you know, Mr. Chairman, the concept was first articulated by then Secretary of Labor John Dunlop in the Ford Administration. Since the early 1980's, it has been employed by several agencies to address rules involving a number of issues, both complex and relatively straightforward. The examples presented in testimony to this committee are many. The common point they illustrate is the process is extremely flexible and can be applied in a number of ways. It has been shown to be particularly effective when applied to situations involving multiple issues and parties.

We recognize negotiated rulemaking has many advantages over the traditional process. It can serve as an excellent vehicle for information sharing, not just between government and the public, but also, among public parties who may have opposing views and among government agencies who may not agree. The process can clear the air of extraneous or highly charged issues and rhetoric by making all players openly accountable for their actions and comments. All players gain a vested interest or concept of joint ownership in the final product and this usually results in higher compliance and less litigation--both highly desirable goals for any

government agency. Finally, even if a true consensus cannot be reached, the process always increases the level and scope of communication among the players.

Recognizing negotiating rulemaking as a potential means for removing our current stalemate over setting new standards for respirator certification, Mr. Chairman, we have approached NIOSH and The Department of Health and Human Services to see if they are willing to try the process with 42-CFR-84. While they have not yet accepted or rejected our request, it is clear they have some reservations about the process based on their lack of experience in negotiated rulemaking.

Given the intent of this legislation, Mr. Chairman, we believe you hit the nail on the head. By providing a base of information and the availability of individuals experienced in the process, The Administrative Conference of the United States could assist agencies like HHS and NIOSH when embarking on a new process like negotiated rulemaking. A process which may be the only solution to what appears to be an intractable rulemaking stalemate which could, in our view, get the process back on track.

Thank you, Mr. Chairman.

For further information contact:
Fred Hannett
The Jefferson Group
202-833-3535

Mr. FRANK. Thank you.

I am very interested in this because this is the kind of example that people have alluded to where an agency is hesitant. Have they indicated why they are hesitant?

Mr. WILCHER. No, they have not responded to our requests.

Mr. FRANK. They don't think they have statutory authority?

Mr. WILCHER. We don't know. We have participated in their public hearings but it was a one-way process. There were a number of people participating in the hearing and there were no questions or answers allowed, no dialogue.

Mr. FRANK. Who are the potential parties that might be involved in that?

You said "adversarial," and who are the adversaries?

Mr. WILCHER. Insofar as the record is concerned, there were over 200 comments submitted on the proposal and 197 of them are probably opposed to the regulation as proposed. This involves labor, AFL-CIO, the chemical companies, OSHA.

Mr. FRANK. Who is in favor of it?

I am trying to get a sense of how you would restructure it.

Mr. WILCHER. I don't know.

Mr. FRANK. No one is in favor of the regulation?

Mr. WILCHER. No.

Mr. FRANK. And you say the representatives of the workers, as well as the manufacturers, are against it?

Mr. WILCHER. Right.

Mr. FRANK. What is causing the stalemate?

Mr. WILCHER. We don't know. We are unable to get any reply from the agency.

Mr. FRANK. Given this situation, they have been unwilling, you think, because they want to stay within the formal procedures?

Mr. WILCHER. That is what it has been so far.

Mr. FRANK. They feel it would be improper having judges over and above the formal proceedings?

Mr. WILCHER. Yes.

Mr. Chairman, with me is Mr. Frederick J. Hannett from the Jefferson Group.

Mr. HANNETT. Mr. Chairman, that is the key point, that they have participated in a number of open sessions, but the open sessions are one-sided in the sense that NIOSH is willing to sit and listen, but not join in.

Mr. FRANK. They do not think it is proper for the agency?

Mr. HANNETT. Yes, in terms of ex parte contact and in terms of the rulemaking process.

Mr. FRANK. Did they express this to you?

Mr. HANNETT. Yes.

Mr. FRANK. I guess your response would be if you did negotiated rulemaking you wouldn't have to worry about ex parte—they wouldn't be ex parte—it would be everybody.

Mr. HANNETT. More importantly, instead of hearing our comments in isolation, or the end user's comments, or labor's comments, or the health and safety official's comments, bringing everyone to the table in an open session has some definite advantages. I think that is the key.

Mr. FRANK. I think so. What I will probably do is ask the staff to write to NIOSH and ask them if they think there are statutory obstacles.

Have you requested this informally in a relaxed setting with them?

Mr. HANNETT. Yes. We asked them to accept it, to end the current process and go through negotiated rulemaking.

Mr. FRANK. Have they responded?

Mr. HANNETT. No.

Mr. FRANK. What I would be interested in knowing is whether or not they would like the power to do it if they decided to do it.

I appreciate all of your comments and those are all the questions I have.

Thank you.

Next we will hear from the National Senior Citizens Law Center, Ms. Eileen Sweeney.

Ms. SWEENEY. Mr. Chairman, my purpose in testifying is to raise some of the legal and practical consequences for low-income individuals and their representatives.

My testimony is really not about the National Senior Citizens Law Center sitting at the table, but about the low-income individuals.

Where an agency undertakes to engage in negotiated rulemaking, it will be even harder for a commenter to persuade the agency to change the proposed rule as a result of the published notice of proposed rulemaking.

I will admit it is not easy right now to accomplish that. But, it will be even harder because the proposed rule will be the product of a compromise which the agency will not want to jeopardize. The result of this process, therefore, is to dilute the usefulness of the proposed rulemaking process. Therefore, it becomes just that much more critical to assure (1) that the negotiated rulemaking is not an option for certain categories of regulations and; (2) in all other cases where their interests are affected, that the rules are designed to facilitate the inclusion of low-income individuals and their representatives in the process.

In my statement I discuss this specific concern and others. I will focus on only a couple concerns here.

First, the bills should not limit the applicability of the Federal Advisory Committee Act. I understand that there are many statements that this bill is viewed as clarifying that the procedure should fall under the Act and that is certainly true, but there is a major exception to the rule. Both the House and Senate bills provide that subgroups of the committee may go off and work on an issue in private and report back to the full group.

This is an incredible invitation to abuse. It will lead to secret sessions in which the vast majority of the work is accomplished. There will be perfunctory open sessions to rubber stamp what was done in the secret session. While this may not be the intent of the Congress, it will be the result. There is already a fairly strong dislike in the agencies for the open meeting provisions of the Federal Advisory Committee Act.

At the Social Security Administration, the agency with which I am most familiar, SSA had to be regularly reminded about its obli-

gations under FACA when it operated the statutorily-created Commission on the Evaluation of Pain and the Disability Advisory Council (DAC).

With regard to the DAC, when SSA could not shake its public by moving the meeting out of Washington, it deleted one of the items on its agenda, a meeting with SSA's chief medical adviser, rather than include the public in the meeting.

Given this sort of hostility toward, or at least discomfort with, the FACA, it is reasonable to expect that under the proposed language, there would be very little accomplished in public. There would be no way for the public to know what considerations had really gone into the rule.

My second concern is that these rules are not appropriate in cases where individual rights and protections are at stake.

Congress should determine what the public interest is. Where the Congress has specified that an individual has a particular right, such as the right not to be discriminated against in employment based upon age or the rights of nursing home residents, if there were interests that opposed the legislation, they either lost or their interests are reflected in compromises Congress reached in passing the legislation. It appears that an agency, through negotiated rulemaking, could invite precisely those same interests to sit down and determine how the new law will be implemented.

In essence, they are given an opportunity to undermine the decision of the Congress on what the right is, to further compromise what may already have been compromised in passing the law.

At a minimum, the bill should be amended to create a statutory exception to these rules which bars their use in situations where the agency is implementing a statutory provision which creates or modifies any right of an individual or protections provided to individuals.

Third, it is very likely that the poor and their advocates will not be invited to serve as interested parties on committees where they should be included. I have listed the reasons for that in the statement and I can only say that Mr. Breger's comments about the fact that the new bill would help the situation really doesn't seem to me to go to the problem.

There is discretion given to provide funds so that individuals who are determined to be necessary parties can travel. However, the standards for determining who are necessary parties are very strict. Given the wide variety of individuals and organizations in the Washington, DC. area, I very sincerely doubt that with regard to programs on the West Coast or the Midwest, ACUS would find that a group was "necessary." They would say that someone else at the table will represent their interests. Paying the fee is not a matter of right under FACA. I don't think that low-income individuals and their representatives' rights would be protected.

I would like to point out another thing that came to our attention. In listening to the comments this morning, I finally made some sense of the Health Care Financing Administrations actions which came about as a result of the wonderful legislation that Congress passed last year on nursing home residents' rights. On some of the tough questions, HCFA is setting up work groups instead of issuing proposed regulations as they have in the past.

There is a question as to the legality of these groups. Initially, they included advocates for nursing home residents, along with a substantial number of providers and individuals representing the provider interests, but the result was that after a few meetings, when the residents' advocates had frequently spoken up in defense of the legislation and in making sure that they got what the Congress intended those residents would get, one day they were no longer invited to the meetings.

It is possible that under the legislation, HCFA would be prevented from doing that. They would have to keep people coming to the meetings, but it is likely that the next time they set up a committee the people would not be invited because they were outspoken and because they thought the battles and compromises were made in the conference here in the Congress and that it was no longer appropriate to do these compromises.

I think there is a different set of issues here for people not funded and well represented to have this type of procedure in place compared to the type of organizations that this gentleman is talking about. They are well funded and they nave credible research capabilities available to them and with poor people It is just not the same sort of issues.

Thank you.

[The statement of Ms. Sweeney follows:]

NATIONAL SENIOR CITIZENS LAW CENTER
Suite 400
2025 M Street, N.W.
Washington, D.C. 20036
Telephone (202) 887-5280

WASHINGTON, D.C.
BURTON D. FRETZ
EXECUTIVE DIRECTOR
ALFRED J. CHEPLIN, JR.
TOBY S. EDELMAN
VICKI GOTTLICH
PATRICIA B. NEMORE
EILEEN P. SWEENEY
STAFF ATTORNEYS

LOS ANGELES, CA.
NEAL S. DUDOVITZ
DEPUTY DIRECTOR
GILL DEFORD
JEANNE FINBERG
PETER B. ROMILOS - HROBSKY
SALLY HART WILSON
STAFF ATTORNEYS

Testimony of Eileen P. Sweeney
before the
Subcommittee on Administrative Law
and Governmental Relations
Judiciary Committee
August 10, 1988

Mr. Chairman, thank you for inviting me to testify today on the very important issues surrounding negotiated rulemaking.

I am a staff attorney at the National Senior Citizens Law Center (NSCLC). NSCLC is a national legal support center funded largely by the Legal Services Corporation. We provide assistance to legal services advocates and members of the private bar in addressing the legal problems of their low-income elderly clients. I specialize in Social Security and Supplemental Security Income issues. NSCLC staff also focus on other programs and laws affecting the elderly, including Medicare, Medicaid, the Older Americans Act, private pensions, and age discrimination.

I am not an expert on negotiated rulemaking. My purpose in testifying is to raise some of the legal and practical consequences for low-income individuals and their representatives of the proposals being considered in the House and Senate. While negotiated rulemaking appears to have some advantages in some rule-making settings and therefore perhaps is worth encouraging, some of the provisions in these bills will effectively foreclose input and access for many low-income individuals and organizations.

Where an agency undertakes to engage in negotiated rulemaking, it will be even harder for a commenter to persuade the agency to change a proposed rule as a result of the published notice of proposed rulemaking. This is because the proposed rule will be the product of a compromise which the agency will not want to jeopardize. The result of this process, therefore, is to dilute the usefulness of the proposed rulemaking process. Therefore, it becomes just that much more critical to assure (1) that

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negotiated rulemaking is not an option for certain categories of regulations and (2) in all other cases where their interests are affected, that the rules are designed to facilitate the inclusion of low-income individuals and their representatives in the process.

1. The bills should not limit the applicability of the Federal Advisory Committee Act.

Both the House and Senate bills contain provisions intended to limit the applicability of the Federal Advisory Committee Act (FACA). Both provide that subgroups of the Committee may go off and work on an issue in private and report back to the full group. The House bill states that this is appro-priate "for the purpose of determining negotiating positions or for developing alternative proposals for consideration by the entire negotiated rule making committee in open session."

This is an incredible invitation to abuse. It will lead to secret sessions in which the vast majority of the work is accomplished. There will be perfunctory open sessions to rubber stamp what was done in the secret session. While this may not be the intent of the Congress, it will be the result. There is already a fairly strong dislike in the agencies for the open meeting provisions of the Federal Advisory Committee Act. At the Social Security Administration, the agency with which I am most familiar, SSA had to be regularly reminded about its obligations under FACA when it operated the statutorily-created Commission on the Evaluation of Pain and the Disability Advisory Council (DAC). With regard to the DAC, when SSA could not shake its public by moving the meeting out of Washington, it deleted one of the items on its agenda, a meeting with SSA's chief medical adviser, rather than include the public in the meeting.

Given this sort of hostility toward, or at least discomfort with, the FACA, it is reasonable to expect that under the proposed language, there would be very little accomplished in public. There would be no way for the public to know what considerations had really gone into the rule.

2. These rules are not appropriate in cases where individual rights and protections are at stake.

Where the Congress has specified that an individual has a particular right, such as the right not to be discriminated against in employment based upon age or the rights of nursing home residents, if there were interests that opposed the legislation, they either lost or their interests are reflected in compromises Congress reached in passing the legislation. It appears that an agency, through negotiated rulemaking, could invite precisely those same

interests to sit down and determine how the new law will be implemented. In essence, they are given an opportunity to undermine the decision of the Congress on what the right is, to further compromise what may already have been compromised in passing the law.

At a minimum, the bill should be amended to create a statutory exception to these rules which bars their use in situations where the agency is implementing a statutory provision which creates or modifies any right of an individual or protections provided to individuals.

3. It is very likely that the poor and their advocates will not be invited to serve as interested parties on committees where they should be included.

While it is somewhat difficult to discuss this problem in the hypothectical, there are a number of reasons to believe that the poor and their advocates will not be included as interested parties on committees where the rule will affect them.

First, in order to keep negotiations manageable there will be inherent pressures to define the relevant interests (and thus the parties) narrowly. This is encouraged by the language in the bills which authorizes the committee to consider the matter "proposed by the agency for consideration" as well as "any other matter which the negotiated rulemaking committee agrees is relevant to the proposed rule." [§8(a) of H.R. 3052, very similar language appears at §8(a) of S.1504] By narrowly defining the issues, an agency can exclude interests which may very well be affected if the committee determines that there are related matters which must also be resolved.

Second, low-income individuals and their representatives, unlike large corporations and healthcare providers, do not have the financial resources to travel to Washington, D.C., for meetings. Under the bills, funds to cover their travel will only be provided if it is determined that "such member's participation on the committee is necessary to assure an adequate representation of the member's interest." [§11(c)(2) of S.1504; §12(c) of H.R. 3052 includes comparable language] It will be extremely tempting for a budget-conscious agency to simply decide either that the individuals interest is not significant enough or that some other member will adequately represent the interest. In all likelihood, the other party will either be better funded or closer to Washington, D.C., or both.

Third, advocates for low-income individuals generally strongly represent their clients' or constituents' perspectives. Any organization or individual, acting in good faith, who is viewed as being difficult or overly critical by the agency will not be invited to participate in future rulemaking done through this procedure. This will either mute their behavior or result in significant voices not being heard in the future.

I am already aware of circumstances in which HCFA has had informal work groups established to focus on certain issues. Advocates for low-income individuals as well as health care providers were invited to participate in the work groups. After a few meetings, advocates who spoke up for the rights of the poor were simply not invited to the next meeting. While it might be possible under this bill for the committee to exclude such an advocate through "consensus" (see discussion below), it is more likely that the agency would simply exclude the advocate from any future committees.

4. The standard for seeking inclusion on a committee is too restrictive and will result in necessary parties being excluded.

There are two problems with the provisions permitting a person to nominate himself, herself or someone else. [§6(b) of H.R. 3052; §6(b) of S.1504] First, neither of the bills require that the agency provide notice of this provision in the Federal Register notice. §6(a) of each bill lists the items which the agency must include. Neither refers to the language in §6(b).

Second, both bills require a person who wishes to apply for membership in the committee or to nominate someone else for membership to explain "why the persons specified in the [Federal Register notice] will not adequately represent the interest with respect to which the application or nomination is submitted." [§6(b)(3) of H.R. 3052; similar language appears at §6(b)(4) of S.1504.]

This standard appears relatively simple but it not. For example, serious problems could arise if the individual believes that, despite the "description of the subject and scope of the rule to be developed, and the issues to be considered" [§6(a)(2) of both bills], the committee is likely to also focus on other issues of concern to the individual. Or, it is possible that the agency will tend to identify members from large Washington-based organizations not only because of their possible expertise but also because §11 of H.R. 3052 authorizes the agency "to utilize the services and facilities of... public and private agencies and instrumentalities with the consent of such agencies and instrumentalities and with or without

reimbursement to such agencies, and to accept voluntary and uncompensated services..." [§10(b) of S.1504 is virtually identical]. While a smaller group which represents low-income individuals' problems may believe that it could offer a different perspective, one which needs to be heard, it may not be possible to distinguish the "interests" from others already identified as members.

5. There is a question of whether unanimous "consensus" can be defeated by less than a unanimous vote.

Both H.R. 3052 and S.1504 provide that the committee will operate by "consensus." This term is first defined as "unanimous agreement among the interests represented..." [§4(7)(A) of H.R. 3052] and "unanimous concurrence among the interests represented..." [§4(2) of S.1504] Each bill then provides that the committee can agree that something less than unanimity will constitute "consensus."

The bills define "interests" as "multiple parties which have a similar point of view or which are likely to be affected in a similar manner." [§4(5) of S.1504 and §4(8) of H.R. 3052] Both bills define a "party" by reference to 5 U.S.C. §551(3). [§4(6) of S.1504, §4(3) of H.R. 3052].

5 U.S.C. §551(3) defines a "party" to be:

> "(3) 'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes';"

Therefore, by defining "interests" in terms of "multiple parties," it appears that it is possible for a committee to achieve "unanimous" consensus to redefine consensus to require less than unanimity without all committee members agreeing.

As written, it seems to be possible for such a diluted "consensus" of "interests" to actually remove a member of the committee. §8(f) of H.R. 3052 permits a committee to "change its membership, rules or agenda if the interests represented on the negotiated rulemaking committee reach a consensus on such change." [This language does not appear in §8(e) of S.1504.] They could also reach a "consensus" on substantive issues with which some members strenuously disagree.

6. It is not desirable to completely foreclose judicial review.

H.R. 3052 bars judicial review of "any agency action pertaining to a negotiated rule making procedure." It does not bar "judicial review of a rule which is otherwise provided by law." (section 14). S.1504 bars judicial review of "any agency action relating to convening, assisting, or terminating a negotiated rulemaking committee" (section 13) and includes the same second sentence as H.R. 3052. The Senate language is more easily understood to not limit judicial review of any substantive problems nor of the agency's failure to follow other requirements of the Administrative Procedure Act.

Even within this relatively narrow area, it does not seem wise to totally bar an individual or organization from challenging an agency's decision not to include the person or group on the committee. The possibility of such judicial scrutiny would help to assure that the agency fairly assesses the composition of the group in the first place.

Thank you for considering my concerns.

Mr. FRANK. I appreciate your testifying and we will go into that because I understand the concerns and this matter of the concerns of the poor people who seem to be at a disadvantage just as much in the formal process as in the informal processes.

As far as their rights are concerned, what I am going to ask you to do, not now, out if you would give us some suggestions as to how to negotiate this process so as to be able to go forward with this having the rights of all parties protected, that would be very helpful.

As I have listened to all of the testimony, it seems that we should be capable of mandating representation while allowing flexibility.

If you have some specific concerns about that, I would like to have them, because I think we can develop this so that we have some way of protecting their rights but allowing the negotiations to go forth.

I know that you make the point that the poor people should be able to be involved.

Ms. SWEENEY. I think that is right.

Mr. FRANK. Maybe we can mandate some better protections while at the same time allowing some flexibility. So I would invite you and your organization to submit those things to us.

Mr. Coble?

Mr. COBLE. No questions. Thank you.

Mr. FRANK. I nave no further questions either.

It seems we should take some action in this area and as I said, I am skeptical that we will be able to do it this year in the right way, but it is on our agenda and we will keep working on it.

Thank you.

We will adjourn this hearing and if there is any supplementary material that the witnesses would like to submit we will be glad to have it.

Mr. FRANK. The hearing on this matter is now closed.

[Whereupon, at 10:35 a.m., the subcommittee proceeced to other business.]

ADDITIONAL MATERIAL

NATIONAL SENIOR CITIZENS LAW CENTER
Suite 400
2025 M Street, N.W.
Washington, D.C. 20036
Telephone (202) 887-5280

WASHINGTON, D.C.
BURTON D. FRETZ
EXECUTIVE DIRECTOR
ALFRED J. CHAPLIN, JR.
TOBY S. EDELMAN
VICKI GOTTLICH
PATRICIA B. NEMORE
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JEANNE FINBERG
PETER S. KOMLOS - HROBSKY
SALLY HART WILSON
STAFF ATTORNEYS

September 27, 1988

Belle Cummins
Judiciary Committee
B-351A Rayburn House Office Building
Washington, D.C. 20515

Dear Belle:

Pursuant to Representative Frank's request at the hearing in August on negotiated rulemaking, I am forwarding my suggestions for improvements which should be made in the bill to assure that the interests of low-income individuals are better protected. I am presenting these suggestions after consultation with other legal services attorneys who work on issues other than those affecting elderly and disabled individuals.

I hope that you will find these suggestions to be useful. Please let me know if I can be of further assistance.

Sincerely,

Eileen

Eileen P. Sweeney
Staff Attorney

cc: Jeff Lubbers, ACUS
Dan Dozier, Federal Mediation Service
Elise Bean, Office of Senator Levin

Proposed improvements to reg neg bill

1. Application of FACA to the work of subcommittees

Current language: Section 11(a) of S.1504 says that FACA applies except not for (1) meetings of individuals for the purpose of considering and advising an agency on the feasibility of setting up a committee; (2) "as otherwise provided by this Act." Section 11(b) says "meetings of subgroups or caucuses" of the committee may meet "in closed session" for the purpose of "determining negotiating positions, alternative proposals, or other items, for presentation to the full committee in open session."

Proposed change: Section 11(b) should be amended to say that while it is permissible for subgroups or caucuses to meet in closed session in order to determine negotiating positions, any and all meetings of subgroups, the purpose of which is to consider or discuss the merits of proposals for consideration by the full group, must be in open session.

2. Identity of the convenor

Current language: §4(3) defines a "convenor" as "a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking."

§5(b)(1) says the agency "may" use the services of a convenor to assist the agency in determining if a committee would be feasible and appropriate and identifying persons that will be significantly affected by a proposed rule." 5(b)(2) requires the convenor to file a report of findings and recommendations. "Upon request of the agency," the convenor will identify the names of people willing and qualified to sit on the committee. The report and recommendations are available to the public upon request.

§10(a)(2) requires the agency to determine whether a possible convenor "has any financial or other interest that would preclude such person from serving in an impartial and independent manner."

Proposed changes: (1) Require that the agency involve an outside convenor. [The alternative is that agency staff will make these decisions.] (2) Provide that the agency should provide the convenor with a list of potential committee members, to be supplemented as seen appropriate by the convenor.

3. Identity of the facilitator:

Current language: §4(4) defines "facilitator" as a person "who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop and negotiate a proposed rule."

§8(d) says that the facilitator chairs the meetings "in an impartial manner;" "impartially assists" the members in conducting discussions and negotiations; and manages the keeping of minutes and records.

§8(c)(1) provides that the agency may nominate either a federal employee or someone else to be facilitator. This decision is subject to approval by the committee. If not approved, the agency must make a substitute nomination. If no agreement can be reached, the committee shall select a person.

§8(b) says that representatives of the agency shall participate fully in the committee. §8(c)(1) bars the "person designated to represent the agency in substantive issues" from being the facilitator or the chair.

Proposed change: The facilitator may be a federal employee (or someone else) but can not be an employee of the agency or department involved in the regulatory process nor any political appointee of any agency or department.

4. Membership on the committee notice of the opportunity to petition for membership in the committee; Identity of the person who decides if a petitioner should be represented on the committee;

Current language: §7(c) requires the agency to limit membership on the committee "to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership."

§6(a) requires that the notice in the Federal Register proposing the establishment of the committee must include a list of the interests and persons proposed to represent those interests. Among other requirements, the notice must solicit comments on the proposed committee and its membership.

§6(b) provides that persons who believe their interests are not represented may apply for membership or nominate someone else. The provision specifies the information that must be included in the application. The fourth item is "the reasons that the persons specified in the notice...do not adequately represent the interests of the person submitting the application or nomination."

§7(b)(1) says that, if after the comment period expires, the agency determines "that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule...," it will establish the committee. [It therefore appears that it is the agency that decides whether an application for membership on the committee will be granted or denied.]

§13 bars judicial review of "any agency action relating to convening, assisting, or terminating" a committee.

Proposed changes: (1) There should be a specific requirement that special attention must be given to fair representation of low-income and minority people by experienced and acknowledged representatives of low-income and minority people in the original composition of the committee as well as in considering later applications. And, given the limited resources of such organizations, there should be a rule which mandates payment of their costs to participate in the process.

(2) The convenor (assuming s/he is not an agency employee) should make the decision on whether an application for membership will be granted.

(3) To assure that there will be enough room at the table for interests identified through the notice of the proposal to create the committee, there should be a requirement that the notice can not list more than 18 proposed representatives. This will allow for thoughtful consideration of applications which result from the proposed notice and will permit the inclusion of additional representatives if that is determined to be appropriate. [With membership set at a maximum of 25, if the notice listed that number or almost that number, it would be very difficult for others to be included. This is likely to be true even with the language granting discretion to expand the group.]

(4) The notice of the proposed committee must specifically state that it is possible to make such an application and the procedure for applying, including all of the information which must be provided by the applicant.

(5) Under the Legal Services Corporation Act, administrative advocacy by attorneys employed by programs receiving funds from LSC is only permitted on behalf of a specific client or at the invitation of the agency. To make it clear that a legal services attorney could apply for membership on a committee, there should be a specific provision which says that, for purposes of the Legal Services Corporation Act, a notice of the proposed creation of a negotiated rulemaking committee shall be deemed to be an invitation by the agency to a legal services attorney to

submit an application for membership on the committee. (This would not affect the standards for determining whether the application is granted.)

(6) The applicant should not be required to show that his/her interests will not be adequately represented by someone who is already included in a committee. Instead, the test should be whether the person will provide a different point of view from those already represented.

5. When is the committee terminated?

Current provision: §9 provides that the committee shall terminate upon promulgation of the final rule, unless the committee or the agency specify an earlier date.

Proposed change: Shift the emphasis to the committee provisionally ending at the time of issuance of the proposed regulation, with the agency having the option of recalling the committee without having to re-charter it, up until the time of issuance of the final regulation.

6. Financial assistance to assure that an interested party is able to be present at the table

Current provision: §12(f) authorizes ACUS "to pay, upon request of an agency head, all or part of the expenses of convening a committee and conducting a negotiated rulemaking." This includes "(2) certain costs of committee members determined by the agency to be eligible for assistance under §11(c)..."

§11(c) says that the members of committees are responsible for their own expenses "except that an agency may, under §7(d) of the Federal Advisory Committee Act (5 U.S.C. App. 2), pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if - (1) such member certifies a lack of adequate financial resources to participate in the committee; and (2) the agency determines that such member's participation on the committee is necessary to assure an adequate representation of the member's interest."

Proposed changes: (1) The convenor, as well as the agency, should be able to make the determination and request necessary to seek payment.

(2) The determination of need should not be affected by the fact that the agency could find a substitute to represent the interest who would not need financial assistance.

See, also, the discussion in #4(1), supra.

7. Coverage by APA

Current language: Not mentioned.

Proposed addition: Add language which eliminates the second exception to notice and comment rulemaking, 5 U.S.C. §553(a)(2). This section excludes "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" from notice and comment rulemaking.

While some agencies utilize notice and comment rulemaking in grants and benefits situations it is generally discretionary. [There are some specific statutory instructions to follow the APA.] This bill seems to leave open the possibility that an agency could utilize the committee structure but not the notice and comment rulemaking in areas that fall under the exception. As there appears to be fairly widespread support for elimination of the exception, at least as it applies to grants and benefits.

While it might be possible to say that where the agency used reg neg it had to follow the APA procedures or public notice and comment, this might create a disincentive for using reg neg in agencies on issues not covered by the APA. This, therefore, appears to be an excellent opportunity to simply eliminate the exception.

8. Role of OMB

Current language: Not mentioned.

Proposed addition: Include language which requires OMB to be a party at the table. This would possibly make it more likely that OMB would approve an agency proposal based on the committee's recommendations or at least be more informed of the considerations supporting it.

9. Judicial review

Current language: §13 bars judicial review of issues related to "convening, assisting, or terminating" a committee. It does not affect judicial review of the rule: "Nothing in this section shall bar judicial review of a rule which is otherwise provided by law."

Proposed addition: There should be language that says that the rulemaking stands on its own, that courts are not to give a rule any special respect because this process was utilized. It should also state that it is irrelevant that a position was expressed at the committee meetings and rejected by the committee.

10. Sunset date

Current language: §6 provides that the Act ceases in 6 years although it allows for the continuation of proceedings which are already in place at that time.

Proposed change: Given the experimental nature of the proceedings, it would be better if there was a shorter sunset date, perhaps two years. Before the expiration of the time period, ACUS would be instructed to conduct a study of the process and report to the Congress. Among the issues it would study would be the extent to which the interests of low-income and minority individuals have be fully represented on the committees where their representation would have been appropriate. Congress would then, if it chose to do so, be in the position to reauthorize the committees before the original legislation expired.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

August 12, 1988

OFFICE OF
THE CHAIRMAN

Congressman Barney Frank
Chairman
Subcommittee on Administrative Law and Governmental Relations
Committee on the Judiciary
B351-A Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I would like to thank you once again for the opportunity to appear before the Subcommittee on Administrative Law and Governmental Relations to testify on H.R. 3052, the Negotiated Rule Making Act. I am pleased to enclose a list of all negotiated rulemaking proceedings to date in response to your request at the hearing.

You asked particularly about the two bills mandating reg-neg that have been passed this year. A brief description of each is included in the enclosed material. The Hawkins-Stafford Elementary and Secondary School Improvement Amendments Act of 1988 (Pub. L. 100-297) is described under the Department of Education, on page 5. The Price-Anderson Amendments Act (H.R. 1414) is described under the Nuclear Regulatory Commission, on page 4.

We hope that it will be possible to advance either H.R. 3052 or Senator Levin's bill, S. 1504, in the present session of Congress. My staff and I will be happy to assist you in any way you suggest.

Sincerely yours,

Marshall J. Breger
Chairman

Enclosure

NEGOTIATED RULEMAKING PROCEEDINGS

Department of Transportation — Federal Aviation Administration

Flight Time Limitations and Rest Requirements for Flight Crewmembers in Air Transportation

The first agency to start, and to complete, a negotiated rulemaking proceeding was the FAA. A committee was convened to negotiate a revision of flight and rest time requirements for domestic airline pilots. The existing rules had been in effect for approximately 30 years and were substantially outmoded, causing FAA to issue more than 1000 pages of interpretations. On several previous occasions, the agency had made proposals for revising the rules, but withdrew them because of substantial opposition.

Representatives of airlines, pilot organizations, public interest groups, and other interested parties met from June to September 1983, with an additional meeting in February 1984 to discuss the proposed rule, and a meeting in September 1984, after the public comment period on the proposed rule.

FAA published a notice of proposed rulemaking based on the negotiations on March 28, 1984 (49 Fed. Reg. 12136), and a final rule on July 18, 1985 (50 Fed. Reg. 29306), effective October 1, 1985.

Department of Transportation — Office of the Secretary

Nondiscrimination on the Basis of Handicap in Air Travel

The Department of Transportation convened an advisory committee to negotiate a proposed rule concerning nondiscrimination on the basis of handicap in air travel, implementing the Air Carrier Access Act of 1986.

DOT published a notice of proposed rulemaking on June 22, 1988 (53 Fed. Reg. 23574). According to the NPRM, the committee met from June to November 1987, tentatively agreeing on a substantial number of issues and producing proposed consensus recommendations for regulatory language on those points. However, the negotiations were not completed because of an impasse over the issue of exit row restrictions. The proposed rule is based largely upon the results of the negotiations. The comment period for the proposed rule runs until September 20, 1988. The Department has not terminated the committee, which may be reconvened later in the proceeding.

Environmental Protection Agency

Nonconformance Penalties under §206(g) of the Clean Air Act

Section 206(g) of the Clean Air Act, 42 U.S.C. §7525(g), requires EPA to issue a certificate of conformity for any class of heavy-duty vehicles or engines which exceed certain emissions standards, but which do not exceed an upper limit associated with that standard, provided the manufacturer pays a monetary penalty for nonconformance. EPA's negotiated rule implemented this statutory provision by specifying criteria for the availability of penalties, the method of establishing upper limits, a testing program, and a penalty formula.

A rule was successfully negotiated by a committee that met from June 14, 1984 to October 12, 1984. A notice of proposed rulemaking was published on March 6, 1985 (50 Fed. Reg. 9204). The final rule was published on August 30, 1985, effective September 30, 1985 (50 Fed. Reg. 35374).

Emergency Pesticide Exemptions under Section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act

Section 18 of FIFRA gives the EPA Administrator authority, at his discretion, to exempt any federal or state agency from any provision of the Act if he determines that emergency conditions exist that warrant an exemption.

A rule was successfully negotiated that revised the criteria and procedures for emergency exemptions adopted in 1973. The negotiating committee met for four months starting in September 1984. The notice of proposed rulemaking was published on April 8, 1985 (50 Fed. Reg. 13944). The final rule was published on January 15, 1986 (51 Fed. Reg. 1896).

Worker Protection Standards for Agricultural Pesticides

EPA proposed to revise its regulations governing worker protection from agricultural pesticides. Meetings of a negotiating committee began on November 4, 1985. In February 1986, members representing farmworkers decided to discontinue their participation in the negotiation process. The remainder of the committee continued to meet and to work with EPA until June 1986, but in light of the absence of one significantly affected interest, a consensus could not be reached.

EPA issued a notice of proposed rulemaking on July 8, 1988 (53 Fed. Reg. 25970), which stated: "Although a consensus on this rule was not achieved, Committee members representing the broad interests affected by this proposal discussed issues and regulatory language and helped shape the proposed regulation. EPA . . . firmly believes that the Committee's deliberations sharpened the issues and will enhance future public discussions generated by this proposal."

New Source Performance Standards for Woodburning Stoves

EPA has adopted a rule setting performance standards for residential woodburning stoves. The standards implement section 111 of the Clean Air Act. They limit emissions of particulate matter from newly manufactured units.

The rule is based on a consensus reached by a negotiating committee that included representatives of the wood heater industry, the environmental community, consumer groups, state air pollution control and energy agencies, and EPA. The committee met from March 19 to August 21, 1986. EPA published a notice of the results of the negotiations in September 1986, a notice of proposed rulemaking and public hearing on February 18, 1987 (52 Fed. Reg. 4994), and the final rule on February 26, 1988 (53 Fed. Reg. 5860).

Resource Conservation and Recovery Act Permit Modifications

EPA convened a committee to negotiate modifications to Resource Conservation and Recovery Act permits for hazardous waste management. Negotiations took place from September 1986 to February 1987, with 21 of the 22 negotiators signing an agreement in principle that was used as the basis for a proposed rule. EPA published the proposed rule on September 23, 1987 (52 Fed. Reg. 35838). A final rule has not yet been issued.

Underground Injection of Hazardous Wastes

EPA convened a committee to negotiate a rule that would implement statutory prohibitions on the underground injection of hazardous wastes (Hazardous and Solid Waste Amendments of 1984). The committee included representatives of industry, environmental and public interest groups, state agencies, and EPA. They met for six months, beginning in September 1986.

EPA published a notice of proposed rulemaking on August 27, 1987 (52 Fed. Reg. 32446), which stated: "Despite substantial agreement on a number of issues and approaches, the group was unsuccessful in generating a draft rule which they could all agree should be used as the basis of the proposal. Notwithstanding this lack of full consensus, as EPA felt they represented the soundest approach, many of the provisions of this proposal reflect the thinking of the negotiating Committee; and today's proposal is substantially similar to the Committee's last draft in many regards."

Asbestos-Containing Materials in Schools

EPA was required under the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, to issue a final rule by October 17, 1987, on inspection and abatement of asbestos-containing materials in school buildings.

An advisory committee was formed to negotiate a proposed rule within a period of a few months. Meetings ran from January 23 to April 3, 1987. Twenty of the 24 interests represented on the committee ultimately signed a set of statements supporting the use of agreed-on portions of proposed regulatory language. EPA published a proposed rule based on the negotiations on April 30, 1987 (52 Fed. Reg. 15820), and a final rule on October 30, 1987 (52 Fed. Reg. 41826), to be effective December 14, 1987.

The final rule was the first reg-neg rule to be challenged in court. The suit was brought by the Safe Buildings Alliance, a group representing former manufacturers of asbestos building products that are now illegal. Plaintiffs in the lawsuit claimed that the rule would encourage unnecessary removal of materials from buildings and would result in a chaotic situation. They sought a more objective standard -- based on air monitoring, for example -- rather than the professional judgment called for under EPA's rule. The Safe Buildings Alliance was represented on the negotiating committee. Several other parties who were represented on the negotiating committee intervened in support of the final rule as published. These included the National Education Association, the American Association of School Administrators, and a group of state attorneys general.

In May 1988, the rule was upheld by the U. S. Court of Appeals for the D.C. Circuit, 846 F.2d 79 (D.C. Cir. 1988). The court determined that EPA's regulation embodied a reasonable interpretation of the requirements of the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 15 USC §§2641-54. Neither the appeal nor the court's decision referred to the negotiation procedure that was followed.

Department of Labor — Occupational Safety and Health Administration

Occupational Exposure to Benzene

Negotiations on a proposed standard for worker exposure to benzene took place from mid-1983 until reaching an impasse in late summer 1984. The negotiations did not result directly in a draft rule, but did serve to narrow the issues in a useful manner. OSHA published a proposed rule on December 10, 1985 (50 Fed. Reg. 50512), and a final rule on September 11, 1987 (52 Fed. Reg. 34460).

Worker Exposure to Methylenedianiline (MDA)

OSHA convened in July 1986 a committee to negotiate a proposed rule on occupational exposure to MDA, an animal carcinogen used in the manufacture of plastics. The committee submitted a set of recommendations that were published by the agency on July 16, 1987 (52 Fed. Reg. 26776).

Based on these recommendations, the agency has drafted a proposed rule that has been submitted to the Office of Management and Budget for review prior to publication in a notice of proposed rulemaking.

Department of the Interior -- Minerals Management Service

Air Quality Regulations for the California Outer Continental Shelf

The Minerals Management Service of the Department of the Interior formed a committee to discuss proposed air quality regulations for oil exploration, production, and development for the outer continental shelf off the coast of California. Discussions are currently continuing.

Nuclear Regulatory Commission

Submission and Management of Records and Documents Related to the Licensing of a Geologic Waste Repository for the Disposal of High-Level Radioactive Waste

NRC formed an advisory committee to negotiate a proposed rule on submission and management of documents relating to the licensing of a geologic repository for disposal of high-level radioactive waste. Committee meetings were originally planned to run from September 1987 through May 1988. However, the composition of the negotiating committee was revised early in 1988 to reflect the narrowed focus on a single site in Nevada for a geologic repository, as provided in the Nuclear Waste Policy Amendments Act of 1987 (Pub. L. 100-203). Meetings of the committee are continuing.

Indemnity Agreements with Radiopharmaceutical Licensees

A bill entitled the Price-Anderson Amendments of 1988 (H.R. 1414) was passed by the House on August 2, 1988, and by the Senate on August 5, 1988. (It awaits presidential action.) Section 19 provides that the Nuclear Regulatory Commission shall within 18 months of enactment determine whether to enter into indemnity agreements with persons licensed by the Commission or a state as radiopharmaceutical licensees. The legislation requires that, for the purpose of making this determination, the NRC must first conduct a negotiated rulemaking in accordance with guidance provided by the Administrative Conference in a 1982 recommendation. The NRC is required to select a convenor from a roster provided by the Administrative Conference. The legislative history makes clear, though, that if no consensual agreement is reached the convenor is to transmit his or her own recommendation to the Commission.

Federal Trade Commission

Informal Dispute Settlement Procedures

FTC convened a committee in mid-1986 to negotiate revisions to the Commission's rule on informal dispute resolution procedures. The committee included representatives of

automobile dealers, consumer groups, state officials, and other interest groups. The agency announced in June 1987 that the committee did not succeed in reaching consensus on a proposed rule.

Department of Education

Financial Assistance to Meet Special Educational Needs of Children

The Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100-297) was enacted on April 28, 1988. Chapter 1 addresses financial assistance to meet special educational needs of children. The Secretary of Education is authorized to issue regulations to ensure compliance with the requirements of the chapter. The new section 1431 (of the amended Elementary and Secondary Education Act of 1965) requires that such regulations must be developed in part through a "modified negotiated rulemaking process as a demonstration of such process." The negotiated rulemaking must be conducted so as to allow issuance of the final rules within 240 days from enactment (i.e., by December 24, 1988).

Section 1431 specifies:

> The modified process shall waive application of the Federal Advisory Committee Act, but shall otherwise follow the guidance provided in [sic] the Administrative Conference of the United States in Recommendation 82-4 . . . and any successor regulation [sic].

The regulations are to result from a "three-step process" involving a series of regional meetings, followed by the reg-neg "on a minimum of 4 key issues," followed by the normal federal regulatory review and notice and comment procedures. The conference committee report states that the conferees will look at this process to see whether it produces regulations that are more clearly understood and widely supported than prior regulations.

The Department published a notice of meeting to conduct a modified negotiated rulemaking process on July 11, 1988 (53 Fed. Reg. 26214).

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